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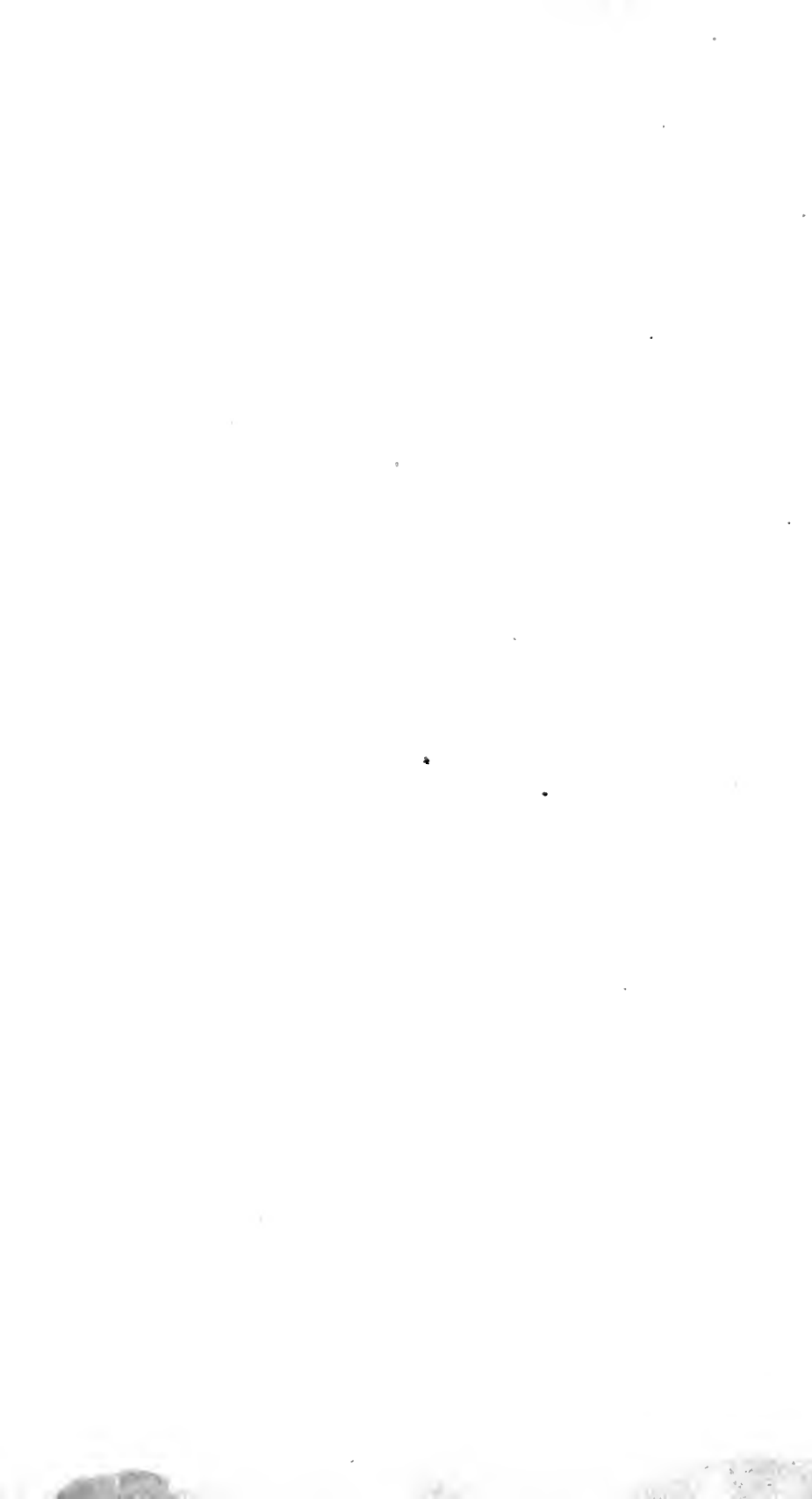


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A TREATISE

ON THE LAW OF

Executors, Administrators and Guardians,

AND OF

THE REMEDIES BY AND AGAINST THEM,

IN

Surrogates' Courts of the State of New York;

TOGETHER WITH

AN ACCOUNT OF THE JURISDICTION AND PRACTICE
OF THOSE COURTS

IN THE

ADMEASUREMENT OF DOWER.

By JOHN WILLARD, LL. D.

LATE ONE OF THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK,
AND AUTHOR OF A TREATISE ON EQUITY JURISPRUDENCE.

ALBANY:

WILLIAM GOULD, LAW BOOKSELLER,

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P R E F A C E .

THE following treatise was commenced by the author, while he held the office of Surrogate of Washington county, near twenty-five years ago. Before its completion, he was appointed to another judicial station, and remained in office till January, 1854. After his retirement from the bench, he was repeatedly desired to complete the work; but did not find leisure to do so until the present time.

The extensive changes introduced into our statutes relative to matters testamentary and of intestacy during the last twenty-five years, and the light shed upon this department of jurisprudence by the repeated decisions of our courts, made it necessary, in order to conform it to the existing state of the law, to re-write the whole treatise. He has accordingly done so, retaining only portions of his early labors. In doing this, he has added greatly to the value of the book; for he has been enabled to avail himself of the latest published decisions of the courts and the last improvements by the legislature.

He has subjoined, in an Appendix, a copious selection of forms, more numerous than will be found in any other treatise on the same subject. Most of these are such as were used by him in his actual business while holding the office of Surrogate; to which others have been added, and all have been carefully revised. It is not claimed that there is any novelty in these forms; for it is believed that the general practice of the various Surrogates' courts is substantially the same in all the counties; and it is desirable to perpetuate that uniformity. They are intended merely as a guide. The practitioner can

readily adapt them to his case, and abridge or expand them as circumstances may require.

A treatise of this kind is not a work of imagination, in which the author can draw his materials from his own mind. He has, therefore, felt it to be his duty, in preparing it, to consult the English treatises on kindred subjects, as well as those published in this state, and has derived assistance from all. He has, however, mainly relied upon the statutes and the adjudged cases for the foundation of his work. He has endeavored to state nothing as law unless it was contained in the statutes or adjudged cases, or was fairly deducible from them.

Should it be asked why the necessity for a new treatise on a subject which has already been discussed by others, it may be answered, without disparagement to any one, that the subject embraces a vast variety of topics, and can scarcely be fully illustrated by any one mind. It is far from being exhausted by the writers who have treated of it, or by the present work.

The testamentary law of this state was borrowed, in a great measure, from that of the mother country. To adapt it to our wants and social condition, has required the aid both of the legislature and the courts. But it was not till within a few years that the decisions of any of the Surrogates were reported. The valuable reports of Mr. BRADFORD have added greatly to our acquaintance with this branch of the law. The subject is alike interesting to the general reader and the legal practitioner. That the present work may contribute something towards a diffusion of knowledge on the topics discussed in it, and furnish aid to those called upon to administer the estates of deceased persons, as executors and administrators, or their counsel, is the ardent wish of the author.

JOHN WILLARD.

SARATOGA SPRINGS, August, 1859.

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ERRATA.

- Page 72, line 26, for “injunction,” read *inquisition*.
 “ 107, “ 2, after “*Rutherford*,” add (1 *Dento*, 33.)
 “ 118, “ 13, for “1853,” read 1813.
 “ 179, “ 13, dele “that.”
 “ 224, “ 6, for “form,” read *forms*.

LAW OF EXECUTORS.

PART I.

OF THE COURT HAVING ORIGINAL JURISDICTION IN THE STATE OF NEW YORK, IN MATTERS TESTAMENTARY, AND OF INTESTACY.

SECTION I.

Of the Courts having jurisdiction to administer the estates of deceased persons, under the Colony and at the close of the Revolution.

BEFORE the American Revolution, the jurisdiction of wills and intestacies belonged, in the colony of New York, to the prerogative court, of which the governor for the time being was ex officio the judge. Though the extent and limitations of this authority are not very accurately known, and are supposed never to have been defined or regulated by any statute, yet in the proceedings of this as well as other courts, the practice of the corresponding English tribunals was imitated, and their customs and forms generally adopted. (*Smith's History N. Y.* 383, 389. *Vanderheyden v. Reid*, 1 *Hopkins*, 410, 411. *Revisers' Notes*, 3 *R. S.* 2d ed. 679.) The jurisdiction itself was declared by an act of the colonial government of the 11th November, 1692, to be

vested in the governor, or in such persons as he should delegate under the seal of the prerogative court, (*Bradford's Col. Laws*, 16.) It was ordinarily exercised, during the period of the colony, by a delegate appointed by the governor, under the seal of the prerogative office. (*Smith's History N. Y.* 383. 1 *R. L.* 1813, p. 454, note.)

The common law of England was generally received as binding on the colony, together with such statutes as were enacted before it had a legislature of its own; but the courts exercised a sovereign authority in determining what part of the common law and statute law should be extended, and what should be rejected as inapplicable to their circumstances and condition. (*Smith's History N. Y.* 372.)

The first constitution of this state, adopted in 1777, expressly recognized the court of probates as a subsisting tribunal, and directed that the clerk of that court should be appointed by the judge thereof. (*Const. of 1777*, § 27.) By other provisions of that instrument the judge of the court of probates was appointed by, and held his office during the pleasure of the council of appointment. The act to organize the government, under the constitution, did not pass until the 16th March, 1778. (1 *Greenl.* 17.) By that act it was, amongst other things, enacted, that the judge of the court of probate should be vested with all and singular the powers and authorities, and have the like jurisdiction in testamentary matters, which, while this state, as the colony of New York, was subject to the crown of Great Britain, the governor or commander in chief of the colony, for the time being, had and exercised, as judge of the prerogative court, or court of probates of the said colony, except as to the nomination and appointment of surrogates of the several counties, who were required to be appointed by the council of appointment, and commissioners under the great seal. By the act of 1784, (1 *Greenl.* 149,) instituting the court for the trial of impeachments and the correction of errors, an appeal was given to that court from the court of probates in like manner as from the court of chancery.

The act of 1778, before cited, directed all letters of administration to be granted by the judge of probates, and all citations and other processes issuing out of the same court, to run in the name

of the people of this state, and be tested in the name of the judge of the said court.

The constitution of 1777 further provided that such parts of the common law of England and the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, 1775, should be and continue the law of this state, subject to such alterations and provisions as the legislature of the state should from time to time make, concerning the same. It excepted such parts of the common law and statutes as might be construed to establish or maintain any particular denomination of christians or their ministers, or concerned allegiance formerly yielded to the king of Great Britain, or as were repugnant to that constitution.

This feature of the constitution was not introductory of any new principle, but was declaratory of the doctrine contended for by the colonists, that the common law, so far as applicable to their circumstances, was their birthright. The principle has been repeated both in the constitution of 1822 and 1846. It is merely a repetition of the great truth, that on the settlement of a new territory by a colony from another country, especially when, as in this case, the colonists continue subject to the same government, they carry with them the general laws of the mother country, which are applicable to the situation of the colonists of the new territory; which laws thus become the laws of the colony until they are altered by common consent, or by legislative enactment. (*Bogardus v. Trinity Church*, 4 Paige, 198. *Commonwealth v. Leach*, 1 Mass. R. 60. *Canal Commissioners v. The People*, 5 Wend. 445. *Commonwealth v. Knowlton*, 2 Mass. 534.)

Although the act of 1778, recognized the office of surrogate, yet it does not appear that that court was organized under the constitution, until the year 1787. It is probable that the duties were performed either by the judge of the court of probates or by surrogates, during the intervening time, under the colonial laws, repealed by the 19th section of the act of 1787.

On the 20th of February, 1787, an act was passed, entitled an act for settling intestates' estates, proving wills and granting administrations. (1 *Greenl.* 363.) It was the statute of distribu

tions of that day. The 6th section provided for the appointment by the governor and council, of surrogates for the several counties of the state, and conferred upon such surrogates, power to take the proof of wills, testaments and codicils, of all persons dying in the several counties, for which such surrogates should be respectively appointed, to make and issue probate thereof, and to grant letters testamentary thereon, and to grant administration, with the will annexed, and in cases of intestacy. They were also authorized to record wills proved before them, with the proof thereof, and all letters testamentary and of administration, by them issued and granted, in books to be provided at their own expense; which records were declared to be of the same force and effect, as the like records in the office of the judge of the court of probates. They were also required to cause a seal of office to be made at their own expense, with a suitable device thereon.

It is said by Chancellor Sanford, in *Vanderheyden v. Reid*, 1 *Hopkins*, 411,) that the records of the prerogative court of the colony cannot now be found. We can, therefore, only learn by tradition and by inference from subsequent statutes the mode of procedure in that court. The 20th section of the act of 1787, (1 *Greenl.* 368,) throws some light on this subject. By that section it was enacted that the courts of the said surrogates, and the court of probates, in the matters submitted to their cognizance respectively, by that act, should proceed according to the course of the courts having by the common law, jurisdiction of the like matters, provided that the same should not be construed to extend to the inflicting any ecclesiastical pains or penalties whatsoever.

The matters submitted to the consideration of the courts, by that act, were in relation to testamentary matters and matters of intestacy, and of the description of cases which at common law were administered by the ecclesiastical courts. It is probable that the business was very loosely conducted by some of these courts. In the preamble to the act of 1792, concerning administrations and escheats, (2 *Greenl.* 420,) it is recited that administrations had been frequently granted in this state, upon the mere suggestion of the party applying for the same, without due proof of the death of the person upon whose estate they were granted; and it had happened that administrations had been granted upon estates of

persons who were then living and residing within this state, and administrations were frequently granted to persons in no wise related to the intestate, and who procured administrations only with a view of appropriating the estates of the intestate to their own use, from which practices great inconveniences were likely to ensue, for remedy whereof it was enacted that no letters of administration should thereafter be granted by the judge of probates or by any surrogate, upon the estate, goods, chattels or credits of any person, represented as having died intestate, until due proof be made before the said judge or surrogate, to his satisfaction, that such person was dead, and died intestate. The statute also provided that on the application for letters of administration upon the estate of an intestate, by a person not entitled to the same as next of kin, the judge or surrogate should issue a citation to the next of kin, before granting such letters, summoning them to appear and show cause why the same should not be granted. The statute contains other provisions for causing notice to be given in case of the non-residence of the next of kin, or in case there are no such, but as they are superseded by the existing provisions, which will be noticed in their proper place, it is unnecessary to mention them.

SECTION II.

Of the Courts having jurisdiction to administer the estates of deceased persons, from the close of the revolution to the abolition of the Court of Probates, in 1823.

During the period embraced in the preceding section, the jurisdiction of the court of probates and of surrogates, seems to have been confined solely to testamentary matters and matters of intestacy. By the act of 1787, (1 *Greenl.* 367,) the judge of the court of probate was empowered to call administrators to account for and touching the estates of any person dying intestate, and to decree distribution, and to compel such administrators to observe and pay the same. He was also authorized to hear and determine all causes touching any legacy or bequest in any last will and testament payable out of the personal estate of the testator, and to decree and compel payment thereof, with a right of appeal to the party aggrieved. But this jurisdiction was not conferred upon

surrogates until the law of 27th March, 1801. (1 *K. & R.* 320. 1 *V. N. & W.* 448, § 11.) The same statute also gave an appeal from the decree of the surrogate to the judge of the court of probate, provided such appeal was entered within fifteen days next after the sentence, decree or order appealed from. It was doubtless found to be oppressive to require parties to attend the settlement of estates at the seat of government, from remote parts of the state.

By the act of 27th March, 1801, (1 *K. & R.* 323,) the executor or administrator, whose testator or intestate should have died seized of any real estate, on discovering that the personal estate of such testator or intestate was insufficient to pay his debts, was authorized to apply to the court of probates or the surrogate of the county in which probate or administration was granted, for authority to sell so much thereof as should be necessary to pay his debts. This statute conferred a jurisdiction upon these courts unknown to the common law. Nor was it, as originally framed, accompanied with necessary safeguards against abuses. It did not limit the time within which the application could be made. Hence, when stale and dormant demands were awakened into life, in order to reach the real estate of the deceased by an unscrupulous personal representatives, a resort was had to the court of chancery for relief. (*Moers v. White*, 6 *John. Ch.* 360.) The evils to which it led it will be seen in the next section, have been remedied by our existing legislation on the subject. As a security against fraud or collusion, the revised law of 1813, (1 *R. L.* 451, § 24,) required that one or more discreet freeholders should be appointed by the surrogate to unite with the executors or administrators in the conveyance on sales by order of the court. This proved to be a useless requirement, and was repealed in 1819. (*Laws of 1819*, p. 215, § 4.)

Another subject of jurisdiction was added to the surrogate by the act of April 5, 1802; (3 *Webster*, 158; 1 *R. L.* of 1813, p. 454;) the allowance and appointment of guardians for infants. It has been supposed by elementary writers that the ecclesiastical courts had a right to appoint a guardian to the personal estate of the infant. (*Swinburne*, 210. *Reeve's Dom. R.* 317.) In *Buck*:

v. *Draper*, (3 *Atk.* 631,) Lord Hardwicke expressed his surprise that ecclesiastical courts in the country should take upon them to appoint guardians *ex officio*, without any suit instituted for that purpose, and by that means break in upon the jurisdiction of the court of chancery with regard to the guardianship of infants. The jurisdiction thus conferred by the act of 1802 did not extend to the judge of the court of probates; nor did it confer on the surrogate any jurisdiction over the guardian as a trustee; or power to remove him, or call him to account. The chancellor exercised that authority by his common law powers. (*Ex parte Crumb*, 2 *John. Ch. R.* 439.)

By the act of April 7, 1806, (1 *R. L. of 1813*, p. 60,) the surrogate was authorized in certain cases to appoint commissioners for the assignment of dower to the widow. The act made no provision for trying, before the surrogate, the title to dower, and the admeasurement was held not to affect or prejudice the right to dower, or the legal or equitable bar to it. (*Matter of Watkins*, 9 *John.* 245. *Larkin v. Randall*, 5 *Cowen*, 168.)

Under the foregoing statutes it was no doubt well held by the courts that the surrogate's court was a court of inferior and limited jurisdiction, and a creature of the statute; and, therefore, that those claiming under its decrees must show *affirmatively* that the surrogate had authority to make the decree, and that the facts upon which he acted gave him jurisdiction of the subject matter, and of the persons before him. (*Dakin v. Hudson*, 6 *Cowen*, 221. *Bloom v. Burdick*, 1 *Hill*, 130. *Corwin v. Merritt*, 3 *Barb. S. C. R.* 341.) In one of the foregoing cases the question was one of pleading, and in the others the objection arose under proceedings for the sale of real estate by order of the surrogate under the act of 1813. The rule is the same with respect to all courts; their judgments in cases where they have no jurisdiction are void, with only this difference, that the jurisdiction of a superior court will be presumed until the contrary appears: whereas an inferior court and those claiming under its authority, must show that it had jurisdiction. (*Per Bronson, J.*, 1 *Hill* 139. *Foot v. Stevens*, 17 *Wend.* 483.)

SECTION III.

Of the Courts having jurisdiction to administer the estates of deceased persons since the abolition of the court of probates in 1823, and as they exist at the present time.

The constitution which was framed in 1821 and took effect fully on the 1st January, 1823, was the commencement of great and salutary reforms in the jurisprudence of this state. It made no special provision, however, for the continuance of the court of probates, or of surrogates' courts, or of any tribunal having jurisdiction over the estates of deceased persons. Like the constitution of 1777, in this respect, it left these matters to the discretion of the legislature. That body accordingly on the 21st March, 1823, (*Laws of 1823, p. 62, ch. 70,*) by act of that date abolished the court of probates, and directed that its records should be deposited and safely kept in the office of the secretary of state. It directed that the jurisdiction of the court of probate, thus abolished, should be vested in the surrogate of any county wherein the personal property of the deceased, or any part thereof, might be at the time of his death; and that he should proceed in the manner and according to the powers theretofore used and exercised by the judge of the court of probates. It required the surrogate to transmit a certified copy of the will so proved before him and the probate thereof, or of the letters of administration so granted, to the secretary of this state, to be by him filed and safely kept in his office. It gave an appeal from the decision of the surrogate to the chancellor, and transferred to that officer all appeals then pending in the court of probates. And it provided that surrogates should thereafter be appointed in the manner prescribed by the constitution for the appointment of judicial officers, and should hold their offices for four years, unless sooner removed by the senate on the recommendation of the person administering the government of this state. The office of surrogate thenceforth became an important one, and the court held by him the only court of original jurisdiction in matters testamentary and of intestacy. Its jurisdiction was general as well as local. It was entitled to the same presumptions in its favor that the supreme court extended to the courts of common pleas, in *Foot v. Stevens*, (17 Wend. 483.)

Notwithstanding surrogates were required by the laws to which reference has been made, to record in proper books, all wills proved before them, letters testamentary and letters of administration and of guardianship, and all orders and decrees, it was found, as late as in 1828, that this duty had been in some counties in a great measure neglected. To remedy this inconvenience as far as practicable, the legislature in that year enacted that it should be the duty of the surrogate of each county in this state, to record in books to be provided for that purpose, all orders and decrees made by any of his predecessors, relating to the sale of real estate, the original of which, signed by the surrogate granting the same, or copies thereof duly authenticated, should be in his office and not recorded; and all letters testamentary and of administration, and all appointments of guardians made by any such predecessor in the said office, which were not already recorded. He was also required to cause the books, in which such proceedings were recorded, to be bound in a plain and substantial manner, to be correctly paged and indexed, the expense of which was to be audited and allowed by the supervisors of the county. (*Laws of 1828, p. 136.*)

It is not deemed necessary to notice the other acts of the legislature in relation to surrogates' courts between the year 1823 and the adoption of the revised statutes in 1830. All the statutes then in force on the subject were revised and consolidated, with such improvements as experience had suggested. The system then inaugurated remains as the basis upon which the subsequent alterations and amendments have been built. The office of surrogate now rests upon the provisions of the constitution of 1846, the revised statutes, and the subsequent enactments on the same subject. It is proposed in the remainder of this section to treat of the surrogate's court under the existing constitution and laws.

And first, it is to be observed, that the office itself was abolished as then existing, except in the city and county of New York, where it was to remain till otherwise ordered by the legislature. The constitution provides for the election of a county judge, who should hold the county court and perform the duties of the office of surrogate. It also empowered the legislature to provide for the election of a separate officer to perform the duties of the office of

surrogates, in counties having a population exceeding forty thousand. (*Const. of 1846, art. 6, § 14.*) In the statute relative to that subject, the officer directed to be elected to perform the duties of the office of surrogate, was denominated "Surrogate" of their respective counties. (*Laws of 1847, p. 308, § 14.*) In the act of 1853, (*p. 1228,*) it is provided that in those counties in which the county judge is also surrogate, he may be named and designated simply as surrogate, without any addition referring to his office as county judge; and in those counties where the surrogate is a distinct officer, the county judge or other officer, when acting as surrogate, shall be designated by his official title, with the addition of the words, "and acting as surrogate."

By the thirty-seventh section of the judiciary act of 1847, (*Laws of 1847, p. 333,*) it was provided that the county judge or other officer elected to perform the duties of the office of surrogate, and the local officers elected to discharge the duties of county judge and surrogate, when acting as surrogate, should possess the same powers and perform all the duties, and exercise the same jurisdiction as were then possessed, performed and exercised by the surrogates of their respective counties, so far as should be consistent with the constitution, and the provisions of that act. And all laws relating to the jurisdiction, powers and duties of surrogates and surrogates' courts, and their proceedings, were declared to be applicable to said judge or other officer, while performing the duties of the office of surrogate, so far as the same could be so applied, and were consistent with the constitution, and the provisions of that act.

The office of surrogate was duly organized under the present constitution, in the city and county of New York, and in the several other counties of the state. It is not deemed material in this connection, to notice the special legislation on this subject, as to particular counties. We are treating now of the general jurisdiction of the court.

Although the surrogate's court is now a court of general jurisdiction, and the only court of original jurisdiction in matters testamentary and of intestacy, and although it possesses a seal and is required to keep a record of its proceedings, it has not been treated by the courts as a court of record, in the common law sense

of that term. Hence it is not a court in which the proceedings for the naturalization of aliens, under the act of congress, can be conducted. The act of congress calls for a court of record, having common law jurisdiction, a seal and a clerk or prothonotary. (3 U. S. L. 477, § 3 of the act of April 14, 1802.) The statutes of this state nowhere describe it as a court of record. On the contrary, the revised statutes denominate it a court of *peculiar and special jurisdiction*, and describe its jurisdiction in the same chapter, with other courts, which are confessedly not of record. (2 R. S. 220.) The same section which defines the powers of the court, directs that they shall be exercised in the cases and in the manner prescribed by the statutes of this state, *and in no other; and no surrogate shall, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever, not expressly given by some statute of this state.* (2 R. S. 221, § 1.) It was quite obvious that before the adoption of the revised statutes, and afterwards, until the repeal of the above restriction, the court could only be treated as a court of limited statutory jurisdiction. (*Dakin v. Hudson*, 6 Cowen, 221. *The People v. Barnes*, 12 Wend. 492. *Corwin v. Merritt*, 3 Barb. S. C. R. 341. *Wilson v. Baptist Ed. Society*, 10 Barb. 308. *Seaman v. Duryea*, *Id.* 523; *S. C. on appeal*, 1 Kernan, 324. *Bloom v. Burdick*, 1 Hill, 134. *Sheldon v. Wright*, 1 Seld. 511, *per Foote, J.*) The restrictive clause, above mentioned, created much embarrassment in the administration of justice by the court. Doubts were entertained whether it was competent for the surrogate to adjourn from day to day, or to administer an oath to a witness, in any matter depending before him; or to issue subpœnas for witnesses out of his county. These, and a variety of other doubts, led to repeated applications to the legislature for an amendment of the law. The subject was referred to the attorney general, and by him a report was made to the legislature, accompanied by a bill, which as amended, was adopted in 1837. (*Laws of 1837, ch. 460, p. 524, et seq.*) This law, amongst other things, repealed the restriction as to the surrogate's jurisdiction, contained in the revised statutes, and above printed in italics, and introduced various other changes in relation to the duties of the office.

The surrogate is a local officer, (1 R. S. 101, § 11,) and can hold

his court only within the limits of his county. His general jurisdiction, by the existing statutes, is:

"1st. To take the proof of wills of real and personal estate, in the cases prescribed by law; and also to take the proof of any will relating to real estate situated within the county of such surrogate, when the testator in such will shall have died out of the state, not being an inhabitant thereof, and not having any assets therein;

"2d. To grant letters testamentary, and of administration;

"3d. To direct and control the conduct, and settle the accounts of executors and administrators;

"4th. To enforce the payment of debts and legacies, and the distribution of the estates of intestates;

"5th. To order the sale and disposition of real estates of deceased persons;

"6th. To administer justice in all matters relating to the affairs of deceased persons, according to the provisions of the statutes of this state;

"7th. To appoint guardians for minors, to remove them, to direct and control their conduct, and to settle their accounts, as prescribed by law;

"8th. To cause the admeasurement of dower to widows; which powers shall be exercised in the cases, and in the manner prescribed by the statutes of the state." (2 R. S. 220, *as amended by the 71st section of the act of 1837, p. 536.*)

The foregoing specification of powers does not comprise a jurisdiction over express trusts, but leaves them to be executed as formerly, by a court having jurisdiction in equity. In one sense every executor is a trustee for the legatees and next of kin. Over the ordinary cases of such trusts jurisdiction is conferred by the foregoing statute. But there are other trusts not there provided for. The revised statutes ousted the surrogate of jurisdiction over the accounts of executors when the latter were liable to account to a court of equity, by reason of any trust, expressly created by any last will and testament. (2 R. S. 94, § 66.) The act of April 10, 1850, provided for this class of cases. (*Laws of 1850, p. 587.*) It allows any trustee created by any last will and testament, or appointed by any competent authority to execute any trust created

by any last will and testament, or any executor or administrator with the will annexed, authorized to execute any such trust, from time to time, to render and finally settle his accounts before the surrogate of the county in which such last will and testament was proved, in the manner provided by law for the final settlement of the accounts of executors and administrators, and for that purpose to obtain and serve in the same manner, the necessary citations requiring all persons interested to attend such final settlement, and allows the decree of the surrogate on such final settlement to be appealed from in the manner provided for an appeal from a decree of a surrogate on the final settlement of the accounts of an executor or administrator, and the like proceedings to be had on such appeal. It declares further, that the final decree of the surrogate on the final settlement of an account thus provided for, or the final determination, decree or judgment of the appellate tribunal, in case of an appeal, shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction, on the final settlement of such accounts, and of the matters relating to such trust, which shall have been embraced in such accounts, or litigated or determined on such settlement thereof. This is an important enlargement of the jurisdiction of the surrogate, but it does not supersede the cognizance of the same matter by courts having jurisdiction in equity. The jurisdiction of the two courts is in this respect concurrent. (*Glover v. Holley*, 2 *Brad. Sur. Rep.* 291.)

It cannot escape observation that most of the amendments which have been made to the law in relation to the jurisdiction of surrogates' courts during the last half century have been designed to enlarge and confirm that jurisdiction. Thus, for years after authority was given to the surrogate to make order for the sale of the real estate of a testator or intestate for the payment of debts, the courts held the party deriving a title under such rule, in a controversy with the heirs, bound to show the regularity of the proceedings. We have seen that the legislature at some times was applied to for relief. It was quite reasonable that a statute authority by which one may be deprived of his estates, should be strictly pursued. (*Bloom v. Burdick*, 1 *Hill*, 131. *Corwin v. Merritt*, 3 *Barb. S. C. R.* 341.) But the reasons on which the earlier cases were

decided, must yield to the enlarged jurisdiction of the court, and the greater intelligence by which its business is conducted. The legislature has felt the force of these considerations, and has by the law of 1850, (*L. of 1850, p. 117,*) given to the sales of real estate made by order of the surrogate, under the provisions of our statutes, the same force and effect as if made by order of a court *having original general jurisdiction*. As a legitimate deduction from this principle, it is further declared that the title of any purchaser at any such sale made in good faith, shall not be impeached or invalidated, by reason of any omission, error, defect or irregularity in the proceedings before the surrogate, or by an allegation of want of jurisdiction on the part of the surrogate; except in the manner and for the causes that the same could be impeached or invalidated, in case such sale had been made pursuant to the order of a court of original general jurisdiction. Sales of real estate made by order of the surrogate stand upon the same footing as sales made by order of the late court of chancery, or the present supreme court. They are void in all cases if made without jurisdiction. But the jurisdiction is now presumed in the surrogate's court as it is in the supreme court, until the contrary appears. (*See Bloom v. Burdick, 1 Hill, 139.*)

It is not improbable that the principles of pleading adopted by the code of procedure in 1848, and which is still contained in that act, (*Code of 1848, § 138; Code of 1851, § 161,*) would have rendered the act of 1850 in a great measure superfluous. Although the code does not profess to regulate the practice in surrogates' courts, yet the section above referred to provides, that in pleading a judgment or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction; but such judgment or determination may be stated to have been duly made. If such allegation be controverted, the party pleading is required to establish on the trial, the facts conferring jurisdiction. Whether this be so or not, the act of 1850 was framed in the spirit of enlightened justice, and was a proper supplement to the principles of the code.

While the act of 1850, chapter 82, above referred to, was not intended to authorize the surrogate, or officer performing the duties of that office, to make order for the sale of real property of a de-

ceased person, or to confirm any such sale, unless upon due examination he should be satisfied that the provisions of law had been complied with, it is quite clear that the object of the legislature was to prevent sales, made in good faith, from being defeated in collateral actions by technical omissions and defects, not affecting the merits of the case. The omissions and defects pointed out in the statute are such as would be corrected on motion, in a court of general jurisdiction, or would be overlooked in a collateral action. (*Laws of 1850, p. 118, §§ 2, 3, 4.*) None of them reach to a want of jurisdiction of the person. Such objections would be fatal in any court. (*Bloom v. Burdick, 1 Hill, 130-140. Rea v. McEachron, 13 Wend. 465. Atkins v. Kinnan, 20 id. 241. Gilchrist v. Rea, 9 Paige, 66.*)

By the law of 1813, (page 451, § 24,) sales of real estate made by order of the court of probate or surrogate were required to be made by the executors or administrators applying for the same, *and such other discreet person or persons* as the judge or surrogate should think proper to appoint, and the conveyance was required to set forth such order at large. During the time this law was in force, however, it had been in numerous instances disregarded, and titles acquired in good faith, proved to be valueless. To remedy this, the legislature, in 1819, (*L. of 1819, p. 214,*) after repealing that provision for future cases, authorized the purchaser, on or before 1st January, 1824, to apply to the chancellor for a confirmation of such sale; and the period within which the application could be made was, in 1825, (*L. of 1825, p. 445,*) extended indefinitely, and made also to embrace the omission of the setting out, in the conveyance, the order of sale. These provisions are now a part of the revised statutes. (2 *R. S.* 116, §§ 61 to 65.) They were followed by frequent applications to the court for the relief contemplated by them. (*Matter of Hemmip, 2 Paige, 317. 3 id. 305. Rea v. McEachron, 13 Wend. 465. Gilchrist v. Rea, 9 Paige, 66. Bostwick v. Atkins, 3 Comst. 53.*) The supreme court now has the same jurisdiction in this respect, that was formerly vested in the court of chancery.

NOTE. The commissioners of pleading and practice, in their report to the legislature in 1850, classed surrogates' courts under head of courts of record. (*Report, p. 14.*) And in their learned note at pages 15 and 16, they show that on sound

principles it was already a court of record. This report was not adopted by the legislature, and the law as to surrogates was left unaltered.

SECTION IV.

Of the Officers of the Court.

It has already been stated that the surrogate is a local officer, and that in the execution of the duties of his office, he is confined to the county for which he was elected. (1 *R. S.* 101, § 11.) By the present constitution of 1846, the county judge is, by the 14th section of article 6, required to do the duties of the office of surrogate, in all the counties but the city and county of New York. In the several counties besides New York, having a population exceeding forty thousand, the legislature is authorized to provide for the election of a separate officer to perform the duties of the office of surrogate.

The city and county of New York stands upon an independent footing. The constitution provides that the surrogate of that city and county should remain, until otherwise directed by the legislature, (*Art.* 14, § 12.) The legislature, in 1847, made provision for the election of surrogate in that city and county, and fixed the term of his office for three years. By a subsequent act, the surrogate is empowered to appoint so many assistants, to aid him in the performance of the duties of his office, as he should deem necessary for that purpose, not exceeding the number which he shall, from time to time, be authorized to appoint by the board of supervisors of the said city and county, whose duty it is, from time to time, to prescribe the number of assistants that may be so appointed, which number may at any time be increased or diminished, by the said board. The board also fixes, and from time to time changes, the salaries of such assistants; but no such salary shall exceed the rate of twelve hundred dollars a year. (*L. of* 1847, *p.* 561, § 7.) These assistants have power, during the term of their appointment, to administer and certify oaths and affirmations in all cases in which said surrogate is authorized to administer the same. (*L. of* 1850, *p.* 384.)

In case a vacancy occurs in the office of surrogate of the city and county of New York, the board of supervisors of said city and

county, is authorized to fill up the same, until the general election next ensuing the happening of such vacancy, when an election is to be held to fill the unexpired term. (*L. of 1847, p. 728, § 3.*)

The surrogate of the county of Kings is authorized and required to appoint one or more clerks, to assist him in his said office. A certificate of their appointment is required to be filed in the office, as evidence of their appointment; and the clerks so appointed have power to administer oaths, and perform such other duties as are properly incident to the business of the office, not inconsistent with the constitution and laws of the state. (*L. of 1849, p. 235.*)

In the other counties of the state the duties of the office are performed by the county judge, by a separate officer elected to perform the duties of the office of surrogate, denominated, the surrogate, (*L. of 1847, p. 308,*) or by local officers elected to discharge the duties of county judge and surrogate. All laws relating to the jurisdiction, powers and duties of surrogates and surrogates' courts, and their proceedings, are made applicable to the officer acting as surrogate, under the provisions of law, so far as the same can be applied, and are consistent with the constitution and the laws of the state.

There is no direct provision in any of our statutes, allowing or permitting parties to appear in surrogates' courts by attorney or counsel. The constitution provides that any male citizen, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state. (*Const. art. 6, § 8.*) In carrying out this provision of the constitution, the legislature, in 1847, enacted that every solicitor in chancery, or attorney of the then supreme court, on the first Monday of July, 1847, should be entitled to practice as attorney, solicitor and counselor, in all the courts of this state. Attorneys in the former court of common pleas were entitled to practice in the county court of the same county; and every male citizen thereafter admitted to the supreme court should be entitled to practice as an attorney, solicitor and counselor, in all courts in this state, until he should be suspended from such practice, by the supreme court. (*L. of 1847, p. 342, § 75.*) It is doubted by a learned

author, (*Dayton's Surrogate*, p. 8,) whether these statutes make attorneys officers of the surrogates' courts, in any other manner than as they represent their clients in justices' courts. There is no direct decision on the point. There is, however, a strong implication from other enactments, that parties in surrogates' courts may have attorneys and counselors, in the sense in which those terms are understood, with reference to courts of record. The language of the constitution and the judiciary act is broad enough to embrace them. The 4th section of the act of 1844, (*L. of 1844*, p. 448,) forbids the son, partner, or clerk of any surrogate from practicing before such surrogate as attorney, solicitor or counsel, for any party to any proceeding before him. This provision is not repealed, either by the constitution or any other statute. (*See, also, L. of 1847*, p. 647, § 51.)

The fact that in the early legislation on the subject of costs, the statute contained no fee bill applicable to the services of attorneys in surrogates' courts, would give rise to the opinion that no such officer as attorney was recognized as a member of the court. Though costs were given in the ecclesiastical courts in England, to the proctor and advocate in those courts, yet they were not usually allowed, if at all, till after the commencement of the present century. (*Dean v. Russell*, 3 *Phill.* 334. 1 *Will. Ex.* 310.) In *Reid v. Vanderheyden*, (5 *Coven*, 719,) it was assumed by the members of the court of errors that the surrogate had no authority to award costs; and the chancellor, in *Shultz v. Pulver*, (3 *Paige*, 185,) says, that on examining the records of the late court of probates, he finds that it had been adjudged by that court that it had no power to allow costs. The revised statutes, however, provided for the allowance of costs in all cases of contests before the surrogate, to be paid either by the party personally, or out of the estate which is the subject of the controversy. (2 *R. S.* 223, § 10.) As no special tariff of fees was prescribed in such cases, it was usual to follow the fee bill of the court of chancery, as far as it was applicable. (*Western v. Romaine*, 1 *Bradf. Surr. Rep.* 37.) At length, in 1837, it was enacted that in all cases where the surrogate was authorized by law to award costs, he should tax them at the same rate allowed for similar services in the courts of common pleas. (*Laws of 1837*, p. 536, § 70.) This section is still in

force, and it was held by the surrogate of New York, in *Western v. Romaine*, (*supra*), that the common pleas fee bill, in force at the time of passing the law of 1837, is still operative, so far as relates to the costs in surrogates' courts. Since the revised statutes and especially since the act of 1837, before cited, no argument can be drawn against the existence of attorneys in surrogates' courts, from the want of a fee bill, but there is now a strong implication in their favor, arising from the provisions above mentioned. The subject of costs in surrogates' courts, belongs, in its other aspects, to a subsequent part of this treatise.

The statute requiring security for costs, in actions brought by non-residents, and subjecting the plaintiff's attorney to such costs to the extent of one hundred dollars, in case he brings a suit for a non-resident without having given the security required by law, has been held not to be applicable to surrogates' courts. (2 *R. S.* 620, § 7. *Westervelt v. Gregg*, 1 *Barb. Ch. R.* 467.)

On general principles there is a propriety of recognizing the existence of attorneys and counselors, as officers of the court of the surrogate. The assistance of those officers in conducting the business of the court, and especially in contested matters, is often indispensable. The fact that they are so employed, whenever the occasion requires it, is undeniable. The tendency of the judicial decisions of late has been towards the recognition of such an officer. And though it has not been expressly decided that such officers are members of the court, it may also be said, that the contrary has not been affirmed.

With respect to the officers of the court by whom the process of surrogates' courts can be served, it is expressly enacted that every sheriff, jailer, coroner, or other executive officer, to whom any citation, subpœna, attachment or other process issued by a surrogate's court, may be directed or delivered for the purpose of being executed, shall execute the same in the same manner as if issued by a court of record. (2 *R. S.* 223, § 9.) Such officer is, by the same act, made subject to the same penalties, actions and proceedings, for any neglect or misfeasance therein, as if the same had occurred in relation to any process issued by courts of record. By the act of 1837, (*p.* 535, § 66,) process of attachment or other compulsory process authorized by law to enforce the orders, process or decrees

of surrogates' courts, may be issued by the surrogate of one county to the officers required by law to serve the same in any other county of the state where it may be necessary to serve the same. The officer receiving the same is authorized to arrest the person against whom it is issued, and to convey him to the county and place where the writ is returnable. Attachments and other compulsory process issued by the surrogate are required to be made returnable to the county from which they issue ; and a large portion of the statute relative to proceedings upon contempt to enforce civil remedies and to protect the rights of parties in civil actions, and which were originally framed in aid of the jurisdiction of courts of record, are made applicable to the attachments issued by surrogates. (2 R. S. 536, §§ 10, 12, 13, 16 to 32.)

The indispensable necessity that the executive officers of the county, should be officers of surrogate's courts, or at least be bound to execute his lawful orders, will be manifest by adverting to the power conferred on the surrogate, in the administration of his office. These are, by the act, (2 R. S. 221, § 6, *as amended by the act of 1830, p. 394,*) 1. To issue subpœnas, under his seal of office, to compel the attendance of any witness residing or being in any part of this state, or the production of any paper, material to any inquiry pending in his court, the form of which shall be similar to that used by courts of record in the like cases. 2. To punish disobedience to any such subpœna, and to punish witnesses for refusing to testify after appearing, in the same manner and to the same extent, as courts of record in similar cases, and by process similar in form to that used by such courts. 3. To issue citations to parties in all matters cognizable in his court, and in the cases prescribed by law, to compel the appearance of such parties. 4. To enforce all lawful orders, process and decrees of his court, by attachment against the persons of those who shall neglect or refuse to comply with such orders and decrees, or to execute such process ; which attachments shall be in form similar to that used by the court of chancery in analogous cases. 5. To exemplify under his seal of office, all transcripts of records, papers or proceedings therein ; which shall be received in evidence in all courts, with the like effect as the exemplifications of the records, papers and proceedings of courts of record. 6. To preserve order

in his court during any judicial proceeding, by punishing contempts which amount to an actual interruption of business, or to an open direct contempt of his authority or person, in the same manner and to the same extent, as courts of record."

The consideration of these powers falls more appropriately under a subsequent part of this treatise. The reference to them in this connection is to show the propriety of considering the executive officers of the county as officers of this court.

In addition to the foregoing mode of obtaining the testimony of witnesses, it is obvious that the jurisdiction would be defective and imperfect if the testimony of an absent witness could not be obtained when his personal attendance cannot be procured. The act of 1837 has provided for this case. By the 77th section of that act, (*L. of 1837, p. 537,*) the surrogate is authorized to issue a commission to take such testimony in the same manner as by law the same may be done in any court of record. This applies to any proceedings or matters in controversy before the surrogate, when the testimony of a witness in any other state or territory of the United States, or any foreign place, is required by any party to such proceedings or controversy. The practice of the supreme court in analogous cases will be followed in taking out and executing such commission. It is regulated by statute. (*2 R. S. 393, et seq.*)

SECTION V.

Of Pleadings in Surrogates' Courts, and of Process.

There is no statute which in terms requires that the parties to a controversy, in a surrogate's court, should present their claim or defense, in the form of written pleadings. In a great majority of the cases which in the country are submitted to the jurisdiction of this court, no form of pleading seems to be contemplated beyond the petition and affidavit verifying the death of the testator or intestate, together with such description of his kindred as may be necessary to inform the court as to the parties who are to be cited. In this class of cases, when there is no controversy anticipated, and the value of the estate to be administered is small, it is seldom necessary to employ counsel in the first instance. The surrogate,

on the proper application, will administer the proper oath, issue the proper process, and give the suitable directions for their service.

But there is another class of cases, where the property left by the deceased is large, and where adverse interests are represented, when it may be important to know what questions are to be litigated, and wherein the parties agree. For this class it is important to know whether, by the practice of the court, any and what pleadings are admissible.

After the abolition of the court of probates, appeals from surrogate's courts were taken to the court of chancery, and so continued while the court remained, except in a few cases where it was taken to the supreme court. We are therefore to look to the court of chancery for the rules which governed the practice of surrogates' courts. In an early case before Chancellor Walworth, (*Foster v. Wilber*, 1 *Paige*, 540,) which came before him, on appeal to the surrogate of Columbia, in an action citing executors to account, he spoke of the proceedings as loose and irregular, because the promoters of the suit, when called on for that purpose, failed to state the grounds of their claim against the executors. On this subject the chancellor observed that it was their duty, when called on for that purpose, to file a written allegation or libel, propounding or stating the substance of their claim against the defendants respectively, and the nature and grounds thereof. If this allegation was insufficient, and showed no grounds for proceedings against the defendants, the court might be called upon to reject it; or they might take issue on the facts propounded; or put in a counter allegation in the nature of a plea in bar. Until some issue was joined in the cause, neither party could be prepared to go into the examination of testimony. (*Approved by Parker, J., Van Vleet v. Burroughs*, 6 *Barb.* 344.)

The act of 1778, (1 *Greenl.* 18, § 3,) vesting in the court of probate the powers, authority and jurisdiction in testamentary matters formerly executed by the prerogative court of the colony, is silent as to the nature of the pleadings to be used by the parties. The chancellor, in *Vanderheyden v. Reed*, (*Hopkins*, 408,) while admitting that the court of probates and prerogative court of the colony were formed upon the model of the ecclesiastical courts of

England, as to the subject of their jurisdiction, held that they were not bound to follow the practice of those courts. He thought the court having the like jurisdiction, might exercise it by such methods of proceeding as are usual and not forbidden by the statutes and laws. Neither the constitution of 1822, or the present constitution, prohibits a common law proceeding, in aid of those courts, which are not required to proceed according to the course of the common law. The chancellor thought, in that case, which was an appeal from the decree of a surrogate in the case of a contest as to the testamentary capacity of a testator, in which the court of chancery occupied the place of the former court of probates, that his jurisdiction might be exercised by the usual course of procedure of the court of chancery, and he accordingly ordered a feigned issue to be tried by a jury. Though this case was reversed by the court of errors, it was upon a point not affecting its authority upon the above question. (5 *Cowen*, 719.) It is certainly desirable that the pleadings in all courts where they are admissible, should be governed by the same rules, and follow, as far as practicable, the same forms. This is according to the spirit of our modern legislation and the decisions of the courts.

The act of 1847 in relation to the judiciary, and which was intended to confer jurisdiction and organization upon the courts, after the adoption of the constitution of 1846, contains a clear implication that pleadings may be adopted in surrogates' courts. (*Laws of 1847*, p. 332, § 45.) It provides that issues of facts which should be joined in any surrogate's court to be tried by a jury, should be tried in the county court of the county in which the surrogate's court is held.

A similar provision was contained in the revised statutes. In case upon the hearing of an application for the sale of the real estate of the deceased, any question of fact should arise, which in the opinion of the surrogate could not be satisfactorily determined without a trial by jury, the surrogate was authorized to award a feigned issue, to be made up in such form as to present the question in dispute, and to order the same to be tried at the next circuit court to be held in the county. New trials were authorized to be granted thereon by the supreme court, and the final determination of the issue was made conclusive as to the facts therein controvert-

ed, in the proceedings before the surrogate. (2 *R. S.* 102, § 11.) Whether the mode of trial by feigned issue is superseded by the provisions of the act of 1847, § 45, or by the code of procedure, § 72, it is not important in this connection to inquire. (*In the matter of Wm. Renwick*, 2 *Bradf. Sur. Rep.* 80.)

So also after the proof before the surrogate of any will of real or personal estate, or of both, an appeal may be taken to the supreme court, and if the decision of the surrogate is reversed upon a question of fact, the supreme court is directed to award a feigned issue to try the questions arising upon the application, and direct the same to be tried at the next circuit court, to be held in the county where the surrogate's decision was made. Such issue was required to be made up and tried in the same manner as issues awarded in the court of chancery. But the supreme court is authorized to grant a new trial in the same manner as if the suit had been originally commenced in that court. (2 *R. S.* 66, 67, as modified by act of 1847, ch. 280, § 17.)

The foregoing, and other provisions in our statutes, contemplate that issues may be framed in surrogate's court, which are proper to be tried by a jury. Although for the formation of an issue it is not indispensable that written pleadings should be employed, yet it is desirable, for the sake of certainty, and to preserve the record of the questions in controversy, that they should be in writing, and drawn up in a form analogous to pleadings in other courts.

The process issued by the court are citation, subpoena for witnesses, attachment to enforce obedience to its orders, and injunctions in certain cases. (*Laws of 1837*, p. 535.) Their nature and the circumstances under which they may be issued, will be more appropriately treated in a subsequent section.

In a contest as to the validity of a will it has been said that a person claiming as next of kin should, in his allegation of interest, show how he was related to the deceased. (*The Public Administrator of New York v. Watts*, 1 *Paige*, 347.) Such party is bound, if required by the adverse party, to propound his interest or show his right to contest the will. (*Id.*) The reversal of this case by the court of errors, was upon a point not affecting the above principle. (*S. C.* 4 *Wend.* 168.)

SECTION VI.

Of the power of Surrogates' Courts to set aside proceedings for irregularity, and to grant new trials on the merits.

The right to grant a new trial on the merits, is an incident of every court of record which possesses general jurisdiction. There is a strong implication against this power in surrogates' courts, arising from the legislative provisions, mentioned in the preceding section, authorizing the supreme court to grant a new trial on issues ordered by a surrogate's court, to be tried in the former court. The general practice when not otherwise provided for by the statute, is for the new trial to be applied for in the court which ordered the issue. (*Doe v. Roe*, 6 *Coven*, 55. *Same v. Same*, 1 *id.* 216.) The fact that this power is not only not given to the surrogate's court, on a feigned issue, but is expressly given to another tribunal, is a strong expression of the legislature adverse to the existence of the power. There is no reported case which recognizes the jurisdiction of surrogates' courts, to give a new trial or rehearing on the merits, and there is no statute conferring the authority.

The power to set aside proceedings for irregularity, and to open defaults depends upon different principles. The practice of the surrogates' courts was originally derived from the practice of the ecclesiastical courts of England, in testamentary matters; which courts there have the incidental powers of a court of chancery, and of the courts of common law, in regulating the proceedings before them, so as to prevent a failure of justice in consequence of mistakes and accidents which human foresight is not always able to guard against. (*Pew v. Hastings*, 1 *Barb. Ch. R.* 453, *per Walworth, Ch. citing Shannery v. Allen*, 1 *Lee's Eccl. Rep.* 9. *Cargill v. Spence*, 3 *Hagg. Eccl. R.* 146.) Thus the chancellor, in the case last cited, held that it was the duty of the surrogate to open a decree for an accounting, which had been obtained by default under circumstances which would have induced the court of chancery to open a like decree; and the decision of the chancellor was affirmed by the court for the correction of errors, on appeal. (1 *Barb. Ch. R.* 455.) In another case, (*Vreedenberg*

v. *Calf*, 9 *Paige*, 128,) the chancellor held that when a surrogate had made an irregular or unauthorized order, he had the power, on a proper application, to set it aside, and that it was his duty to do so where such order was made ex parte. In *Skidmore v. Davis*, (10 *Paige*, 316,) the same chancellor held that the proper remedy of a party against whom an order was granted irregularly by the surrogate, was not by appeal to the chancellor, but an application to the surrogate to set it aside.

The repeal in 1837, (*Laws*, p. 536, § 71,) of the restrictive clause in the revised statutes, (2 *R. S.* 221, § 1,) and which has been before adverted to in these pages, has been supposed to restore to the court certain incidental powers, which were absolutely essential to the administration of justice. (*Isham v. Gibbon*, 1 *Bradf.* 70, 78.) In a still later case, the chancellor held that independently of the statute of 1837, the surrogate was authorized to call in and revoke letters of administration which had been irregularly obtained upon a false suggestion of a matter of fact, and without due notice to the party rightfully entitled to administration. Such appears to have been the undisputed practice of the English ecclesiastical courts in such cases. (*Cornish v. Cornish*, 1 *Lee's Eccl. Rep.* 14. *Burgis v. Burgis*, *Id.* 121. *Ogilvie v. Hamilton*, *Id.* 357. *Smith v. Cary*, *Id.* 418.) The 34th section of the act of 1837, page 530, so far as it relates to this point, was merely in affirmance of the common law, and the principle was applied to other cases when the power was questionable, if it existed at all.

SECTION VII.

Of miscellaneous matters appertaining to the office of Surrogate.

It is proposed, in this section, to advert to certain matters which could not be conveniently arranged under either of the preceding heads.

By the existing law the surrogate of each county is required to provide and keep the following books:

1. A book in which shall be fully and distinctly recorded all wills, testaments and codicils proved before him, and the proof thereof; and in which he may also record any will relating to real

estate situated within his county, which shall have been duly proved before and recorded by any other surrogate; upon the production of an exemplified copy of such record.

2. A book in which shall be recorded in like manner, all letters testamentary and of general and special administration.

3. A book in which shall be entered all minutes of other proceedings, by or before him, in relation to the estates of deceased persons, with all orders and decrees made by him, and minutes of all citations, subpoenas, attachments and other process issued by him, in relation to such estates; and the testimony taken by him in relation to the granting or revocation of letters testamentary, or of administration.

4. A book in which shall be recorded the appointment of guardians of infants, and the revocation of any such appointment.

5. A book in which shall be entered all proceedings in relation to the admeasurement of dower, and all orders, reports and decrees thereupon.

6. A book in which shall be recorded all orders and decrees made by him, upon any proceedings in relation to the sale of the real estate of deceased persons.

7. A book in which shall be entered at length and by items, the fees charged and received by him on all proceedings had before him, under the name of each intestate or testator. (2 R. S. 222, *as modified by the act of 1837, p. 524, §§ 2, 3.* 2 R. S. 110, § 60.) To each of the said books there should be an index of the subjects therein, with a reference to the pages where such subjects may be found; which, together with such books, are required to be at all proper times, open to the inspection of any person paying the fees allowed by law for such examination.

The surrogate was required by the revised statutes, (2 R. S. 222, § 7,) also to keep a book in which should be entered all accounts of executors and administrators, settled before him, and also the accounts rendered by guardians, at full length. This provision was dispensed with by the act of 1837, p. 524, § 2; and as a substitute he is now required to file said accounts, and to record with his decree, a summary statement of the same as they shall be finally settled and allowed by him, which are to be referred to and taken as part of the decree.

Whenever the seal of office of the surrogate shall be lost or destroyed, or shall be so injured that it cannot conveniently be used, the surrogate is required to procure a new one at his own expense, similar in all respects to the former seal, and to give notice thereof to the secretary of state. (2 *R. S.* 221, § 5.) The surrogate appointed for a new county hereafter to be organized, is, in like manner required to procure at his own expense a seal for his office. (*Id.* § 4.)

Formerly, also, the several books in which were recorded all wills proved before the surrogate, together with the proof thereof, and all letters testamentary and of administration by him granted, were required to be furnished *at the expense of the surrogate*. (1 *R. L.* of 1813, p. 446.) But in the revised statutes (2 *R. S.* 222, § 7,) the latter clause was omitted in the section which directs the surrogate to provide suitable books for recording the proceedings of the court; and that expense has since been held by the supreme court to constitute a proper charge against the county. (*MS.*)

Under the revised statutes it had become the practice in some counties of recording wills of real estate proved as such, in a different book from that in which wills admitted to probate were recorded. Hence the same will might be recorded twice in the same office. This is made unnecessary by the law of 1837, if the will is recorded as a will of real estate, before it is admitted to probate. (*Laws of 1837*, p. 528, § 19.) In such a case it seems that the copy of the record already entered, is issued with the letters testamentary, and no new record of the will need be made.

The revised statutes require every surrogate carefully to file and preserve all affidavits, petitions, reports, accounts and all other papers belonging to his court; and all such papers and the books kept by him are declared to belong and appertain to his office, and to be delivered to his successor. (2 *R. S.* 223, § 8.) And by a subsequent section of the same act the successor in office is authorized to complete the business of the court, unfinished when the vacancy occurred.

In *Williamson v. Williamson*, (6 *Paige*, 300,) the chancellor observed that it was the duty of the surrogate, upon the taking of an account, or upon any other proceeding which might be the subject of appeal, to reduce to writing and preserve the evidence and admis-

sions of the parties, so far as to enable him or his successor to make a correct return of the facts, in case it should be necessary in consequence of an appeal to a higher tribunal.

The legislature of this state has always exercised a becoming care, and manifested a deep solicitude, for the purity of the administration of justice. This care has been extended to all holding judicial stations. The design seems to have been not only to guard them against temptation, but also to remove them from every suspicion of partiality. It is not pertinent to our subject to notice these provisions further than as they relate to surrogates. This officer is forbidden to be counsel, solicitor or attorney for or against any executor, administrator, guardian or minor, in any civil action, over whom or whose accounts he could have any jurisdiction by law. (2 R. S. 223, § 13.) He is forbidden also to practice or act as attorney, counsellor or solicitor in his court, or in any cause originating in such court. This prohibition is also extended to the partner in business of the surrogate, who is also forbidden to practice or act as attorney, solicitor or counsellor, in any cause or proceeding before such surrogate, or originating before him. (*Laws of 1847, p. 647, § 51.*) And this prohibition is by another statute extended to the son and clerk as well as the partner of the surrogate. (*Laws of 1844, p. 448, § 4.*)

All judicial officers, and therefore, every surrogate, are forbidden to demand or receive any fees or other compensation, for giving their advice in any matter or thing pending before them, or which they have reason to believe will be brought before them for decision; or for drafting or preparing any papers or other proceedings, relating to any such matter or thing, except in those cases where fees are expressly given by law to such officers, for services performed by them. (2 R. S. 275, § 6, *as amended by the law of 1830, p. 395.*)

In the foregoing cases the disqualification arises from some *act* of the officer. But there may be cases in which the surrogate has been *passive*; and still he may be an improper judge, within the principles of sound morality. Thus, should the surrogate be interested as next of kin to the deceased, or should he be a legatee or devisee under the will; or should he be named as executor or trustee in the will or be a subscribing witness thereto, it is fit that

he should be ousted of jurisdiction, and the duties of the office be transferred to another officer. This is done by the statute. (2 *R. S.* 79, § 48, *as amended in 1830*, p. 390.)

The person who is required to act in the foregoing contingency is the county judge, formerly the first judge under the constitution of 1822, (2 *R. S.* 79, *as altered by the act of 1843*, ch. 121, § 1,) or the local officer elected to perform the duties of the office of county judge and surrogate, or in case of their disability the district attorney of the county, (*Laws of 1847*, p. 330, § 37; *Id.* 643, § 32,) unless he labors under a like disability. When there is no person capable of acting under the provisions of the law, the supreme court is authorized to issue a commission to some suitable person, empowering him to act as surrogate in the premises. (2 *R. S.* 4th ed. 266.)

Under the revised statutes the first judge, when discharging the duties of the office of surrogate, was authorized to use the seal of the court of common pleas of his county without charge. There was a propriety in this, as the office of surrogate was not vacant. Under the like contingency the county judge must use the seal of the county court of his county. (2 *R. S.* 79, § 52, *making the change required by the constitution.*) But if the county judge is required to act in a case where the office of surrogate is vacant, he must use the seal of the surrogate of the county. (*Laws of 1837*, p. 543.) In the former case all papers, vouchers and documents were required to be deposited by the judge in the office of the county clerk of the county, and in the latter to be filed in the surrogate's office. (*Id.*)

Inasmuch as the fact of the surrogate's being a subscribing witness to the will was not originally made a ground of disability in the surrogate by the revised statutes, it was doubted, at one time, whether the first judge possessed the same powers as when the disability of the surrogate arose from the causes mentioned in the act. The act of 1834, page 574, removed this doubt, and gave to the first judge the same jurisdiction in both cases.

The surrogate is required, within twenty days after receiving notice of his election, to execute to the people of this state, with two or more surieies, being freeholders, a joint and several bond, conditioned for the faithful performance of his duty and for the ap-

plication and payment of all moneys and effects that may come into his hands in the execution of his office. The bond of the surrogate of the city and county of New York is to be in the penal sum of ten thousand dollars, and that of every other surrogate in the sum of five thousand dollars. (1 *R. S.* 382, § 87.) The clerk of the county is the judge of the sufficiency of the sureties. He is to take the constitutional oath of office within fifteen days after being notified of his election, which oath may be taken before the clerk of the county, and must be filed in the office of such clerk. It may also be taken before the county judge or a judge of the supreme court. (1 *R. S.* 119, § 20 to 22.)

PART II.

OF THE ORIGINAL AND EXCLUSIVE JURISDICTION OF SURROGATES' COURTS; AND HEREIN OF THE APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.

CHAPTER I.

OF WILLS, THEIR ORIGIN, NATURE AND INCIDENTS.

IT is impossible to have a correct understanding of the duties of executors and administrators, without some previous acquaintance with the law concerning wills and testaments. The unlimited power of testamentary alienation, which every person not laboring under some disability, possesses in this country, over his property, makes it incumbent on those who are entrusted with the management of the estates of deceased persons, to acquire accurate notions of that instrument especially by which their authority is conferred, regulated or restrained. This instrument, when it relates solely to personal property, is usually denominated a will or testament; when it relates to real property it is called a devise; and, in both cases, it may be defined to be the legal declaration of a party's intention which he directs to be performed after his death. (2 *Bl. Com.* 499, 500.) In popular language a testamentary disposition of either real or personal property, or of both together, is denominated a last will and testament. It is proposed to treat briefly in this chapter, of the origin and incidents of wills, both of personal property and of devises of real property.

The power of making a will of personal property is said, by the elementary writers on this subject, to have existed and continued from the earliest records of English law. We have no traces or memorials of any time when it did not exist. But this power, it seems, did not originally extend to all a man's personal estate, unless he died without wife or issue. On the contrary, Glanville informs us that by the common law, as it stood in the reign of Henry 2, a man's goods were to be divided into three parts; of which one went to his heirs, or lineal descendants; another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other. But if he died without either wife or children the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them. Whether this was the general law of the land or prevailed in certain districts only by custom, it is unnecessary to inquire. The law itself became altered by imperceptible degrees, and the deceased might, in England, before the American revolution, bequeath by will the whole of his goods and chattels; though, perhaps, it is impossible to trace out when the first alteration began. (2 *Bl. Com.* 491, 492.) By virtue of several statutes, enacted at different periods, the residue of the whole kingdom has been brought to the same standard, thereby barring the claims of the widow, children and other relations. And thus the old common law, throughout the whole kingdom, was utterly abolished, and the owner was allowed to bequeath the whole of his chattels as freely as he formerly could his third part or moiety. Our ancestors brought to this country so much of the common law in this respect as was suited to their circumstances and condition. In general it may be observed that the right of bequeathing personal property is with us as extensive as the testators' dominion over it.

In England too, by statute, 1 Vict. 26, entitled an act for the amendment of the law with respect to wills, passed 3d July, 1837, it is made lawful for every person to devise, bequeath and dispose of, by his will executed as required by that act, all real estate and

all personal estate which he shall be entitled to, either in law or equity, at the time of his death. (*See this act in Preface to 1 Wms. Executors, 4th Am. ed. from the last London ed. and in the Appendix to Jarman on Wills, 3d Am. ed.*)

It was, at common law, one of the incidents of a last will and testament, in respect to the personalty, that it was a disposition of a man's personal estate to take effect after the death of the testator. It operates on whatever personal estate a man dies possessed of, whether acquired before or after the execution of the instrument. A will of personal property speaks from the death of the testator; a devise of real estate, formerly spoke from the date of the devise. But now, by statute, both speak from the same point of time, the death of the testator. (2 R. S. 57, § 5.) In this respect, the English law and our own are substantially alike.

According to the old authorities of the ecclesiastical law, the appointment of an executor was essential to a testament. (*Swinb. part 1, § 19. Godol. part 1, ch. 1, § 2.*) But this strictness has long ceased to exist, and probably never existed at all in this country.

A *codicil*, in the usual acceptation of the term, is an addition made by the testator, and annexed to, and to be taken as a part of a testament, being for its explanation, or alteration, or to make some additions to, or some subtraction from, the former disposition of the testator. In this sense it is part of the will, all making but one testament. It requires the same formalities to render it valid, and is thus placed in every respect on the same footing as the will. (2 R. S. 68, § 71.)

A will is, in its nature, a different thing from a deed, and although the testator happens to execute it with the formalities of a deed; for example, though he should seal it, which is no part of the ingredient of a will; yet it cannot in such case be considered as a deed. (*Earl of Darlington v. Pultney, 1 Cowper, 261.*)

It is also a peculiar property in a will, as it will hereafter more fully appear, that by its nature, it is in all cases a *revocable* instrument, even should it in terms be made irrevocable; for it is truly said that the first grant and the last will is of the greatest force.

The law of domicile is important to be considered with reference both to wills and the succession to the estates of intestates.

There has been, it is said, a difference of opinion among foreign jurists, whether a will of personal estate, in which the testator has complied with the forms and solemnities required by the *lex loci actus*, is a valid testamentary disposition of such property; although in the form of its execution, such will does not conform to the requirements of the law of the testator's domicile. According to Chancellor Walworth, (*in the matter of Catharine Roberts' will*, 8 Paige, 525,) the better opinion is, that so far as regards the mere formal execution of the testament, it is sufficient if it conforms to the law of the country where the will is made; in accordance with the maxim, *locus regit actum*. (See 17 *Guyot's Rep. de juris*, art. *Testament*, 186. 4 *Burge, Col. and Foreign Law*, 583.) Probably, says the chancellor in the same case, the testament may also be valid if made and executed in conformity to the law of the testator's domicile, although it does not conform in all respects to the *lex loci actus*. (*Story's Conf.* 391.) It appears to be the generally received doctrine, at the present day, that the *status* or capacity of the testator to dispose of his personal estate by will, depends upon the law of his domicile.

The revised statutes of New York seem to contemplate that a will of personal property, by a citizen of this state, is valid, if made in conformity to the requirements of our law; although executed out of this state, and in a place where the local laws require the adoption of a different form. This is a distinct recognition of the principle that the will may be valid, if made and executed in conformity with the law of the testator's domicile. (2 *R. S.* 67, as amended by the act of 1830, p. 389. 3 *R. S.* 152, 5th ed. § 85.) This doctrine has been acted upon by the surrogate of New York, and a mutual or conjoint will executed according to the Danish law by husband and wife, then resident in a Danish colony, has been declared to be valid, though not attested according to the laws of New York. (*Ex parte McCormick*, 2 *Bradf.* 169.)

The law of the testator's domicile at the time of his decease, governs as respects his testamentary capacity. (*Id.* *Story's Conf. Laws*, § 473.) It governs also the rule of succession to his personal estate in case he dies intestate. If, therefore, a foreigner

dies domiciled in England, his personal property in England, in case he were intestate, will be distributed according to the English law of succession; and any will he may have left, whether made in his native or in his adopted country or elsewhere, must be construed according to the law of England. (1 *Jarman on Wills*, 2. *Anstruther v. Chalmers*, 2 *Sim.* 1. *Price v. Dewhurst*, 4 *Mylne & Cr.* 75.) A will of personalty speaks according to the testator's domicile, when there are no other circumstances to contract the application. To raise the question what the testator meant, it must first be ascertained, where was his domicile, and whether he had reference to the laws of that place, or to the laws of a foreign country. (*Harrison v. Nixon*, 9 *Peters*, 483.)

An essential difference between a will and a deed is pointed out in the English books, (1 *Wms. Executors*, 10,) viz: that there cannot be a *joint* or a *mutual will*. Such an instrument, it was remarked by Sir John Nichols, in *Hobson v. Blackburn*, (1 *Add.* 274,) is unknown to the testamentary law of England. Lord Mansfield seems to have been of the same opinion in delivering his judgment in *Earl of Darlington v. Pultney*, (1 *Cowp.* 261.) A different view of the question was taken by the surrogate of New York, in *Day Ex parte*, (1 *Bradf. Sur.* 476.) The learned surrogate held that a mutual will might be admitted to probate on the decease of either of the parties, as his will. But while this was so, the instrument, though irrevocable as a compact, was revocable as a will by any subsequent valid testamentary paper. But if unrevoked, the surrogate thought it might be proved, provided it had been executed with the formalities and ceremonies essential to the due execution of a will.

Cases of mutual wills, though not unfrequent in countries where the civil law prevails, are unusual in this country; and whether valid or not, are not the most advisable form of contract.

It has long been a principle in the ecclesiastical law, that the granting of probate is conclusive as to the testamentary character of the instrument in reference to the personalty. This doctrine has been fully applied in a variety of cases to the surrogates' courts of this state. It was expressly recognized by the chancellor in *Colton v. Ross*, (2 *Paige*, 398,) adopting the rule as expounded

by Lord Eldon, in *Lynn v. Beaver*, (*T. & R.* 67.) The provision of the revised statutes on this subject is not introductory of any new rule, but in affirmance of the common law. It merely makes the probate of any will of personal property, taken by a surrogate having jurisdiction, conclusive evidence of the validity of such will, until such probate be reversed on appeal, or revoked by the surrogate, as afterwards directed, and as will be noticed in its proper place; or the will be declared void by a competent tribunal. (*2 R. S.* 61, § 29. *Vanderpoel v. Van Valkenburgh*, *2 Seld.* 190. *Stephens v. Mead*, *18 Barb. S. C. Rep.* 578.)

But this principle is not applicable, to the same extent, to the decision of the surrogate as to the validity of a devise of real estate contained in the same will. (*Bogardus v. Clark*, *4 Paige*, 623. *Vanderpoel v. Van Valkenburgh*, *supra*.) Jurisdiction is conferred by statute on the surrogate's court to take the proofs of the due execution of wills of real estate, and to record the same together with such proofs. The statute declares that the record of such will, and the exemplification of such record, by the surrogate in whose custody it is, shall be received in evidence, and be as effectual in all cases as the original would be if produced and proved, and may in like manner be repelled by contrary proof. (*2 R. S.* 58, *as amended by the act of 1837*, p. 524 to 528. *3 R. S.* 140, *5th ed.*) The object of the law was to make the certificate of the surrogate and the record of the will, or an exemplification, *prima facie* evidence. In this respect they are placed on the same footing as the record and exemplifications of deeds. (*Vanderpoel v. Van Valkenburgh*, *supra*. *Bogardus v. Clark*, *4 Paige*, 623.) And hence, while the probate of a will is conclusive as to the personalty in all collateral actions, the proof of a will of real estate, and the record thereof taken in conformity to the statute, is merely *prima facie*. The proceeding to obtain probate of a will is said to be in the nature of a proceeding *in rem*, to which all persons having an interest in the subject of litigation may make themselves parties, and are consequently bound by the decree. (*Id.*)

The surrogate's court having thus to a certain extent a jurisdiction over wills of real estate, it is appropriate to our subject to notice, briefly, the origin, progress and incidents of devises.

A devise is a last will and testament, by which real estate is disposed of, to take effect at the death of the devisor. The word devise appears to be derived from divide, and originally meant any kind of division or distribution of property. (*Cruise's Dig. tit. Devise, ch. 1, § 1.*)

It is generally agreed, says the same author, that the power of devising lands existed in the time of the Saxons; but upon the establishment of the Normans, it was taken away as inconsistent with the principles of the feudal law; and although many of the restraints on alienation by deed were removed before Glanville wrote, yet the power of devising lands was not allowed for a long time after; partly from an apprehension of imposition on persons in their last moments; and partly on account of the want of that public notoriety which the common law requires in every transfer of property.

The power of devising continued as to socage lands, situated in cities and boroughs, and also as to all lands in Kent, held by the custom of gavelkind. The restraint upon the power of devising did not give way to the demand of family, and public convenience, so early as the restraint upon the alienation in the lifetime of the owner. The power was indirectly acquired by means of the invention of uses, for a devise of the use was not considered a devise of the land. The devise of the use was supported by the courts of equity as a disposition binding in conscience, and that equitable jurisdiction continued until the use became, by statute, the legal estate. The statute of uses, like the introduction of feuds, again destroyed the privilege of devising, but the disability was removed within five years thereafter, by the statute of wills, 32 Henry 8. That statute applied the power of devising to socage estates, and to two-thirds of the land held by knight service; and this check was removed with the abolition of the military tenures in the beginning of the reign of Charles 2, so as to render the disposition of real property by will absolute. (*Cruise's Dig. tit. Devise, ch. 1. 4 Kent's Com. 504.*)

The English law of devise was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications in some instances, as were deemed expedient. The recognition of this general fact, was in this state emphatically

made by the first constitution, adopted in 1777, and has been substantially repeated in each subsequent revision of the organic law. Our ancestors claimed the common law as their birthright. Lands may be devised by will, in all the United States; and the statute regulations on this subject are substantially the same, as they have been taken from the English statutes of Henry 8, and 29 Charles 2. (*See 1 Greenl. 386 et seq.*)

In this state, by the existing law, a man may devise whatever would, without a devise, descend to his heirs. (2 R. S. 57, § 2.) And if it is so expressed, a devise may operate upon after-acquired lands, as well as upon that which the devisor owned at the time of executing the will. (*Id.* § 5.) It was otherwise, at common law; a devise being considered merely as a conveyance, and operating only upon the interest of which the testator was seized at the time of making the devise, and of which he continued so seized till his death. (*Cruise's Dig. title Devise, ch. 3, § 37.*) So that if a person devised his lands, and was afterwards disseized, and died before entry, the devise was void; but if the devisor re-entered, the devise became again valid, the disseizin being thus purged, and the disseizce being considered as never having been out of possession. But this feature of the common law has, as we have seen, been changed in England by the statute (1 Vict. ch. 26,) already referred to, by force of which every person may devise, bequeath or dispose of, by his will, all real estate and all personal estate, which he shall be entitled to either at law or in equity at the time of his death; and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law. (*See the act in Preface to 1 Wms. Ex'rs, 4th Am. from the last London ed., and in Appendix to 2 Jarman on Wills, § 3.*)

Wills which convey both real and personal property are of a mixed character. They may be both admitted to probate and proved as wills of real estate. The probate will be conclusive, so far as it relates to the personalty, and the record properly attested or exemplified as a will of real estate, will be *prima facie* evidence, in a controversy as to the realty, subject, however, to be repelled by other proof.

In this state, it will be seen hereafter that the requisites to a valid execution of a will are the same, both in a will of real and

personal property ; except that in the latter, a male of the age of eighteen and an unmarried female of the age of sixteen, being in other respects competent, may bequeath his or her personal property by will in writing. (2 *R. S.* 60, § 21.)

A few observations on the subject of nuncupative wills, will close this branch of our subject.

At common law, a will of chattels was good without writing. In ignorant ages there was no other way of making a will than by words or signs. But by the time of Henry 8, and especially in the age of Elizabeth and James, letters had become so generally cultivated, and reading and writing so widely diffused, that verbal, unwritten or nuncupative wills were confined to extreme cases, and held to be justified only upon a plea of necessity. They were found to be liable to great frauds and abuses ; and a case of frightful perjury in setting up a nuncupative will (4 *Vesey*, 196, *note*,) gave rise to the statute of frauds, (29 *Charles 2*, *ch.* 3,) which enacted that no nuncupative will should be good when the estate exceeded thirty pounds, unless proved by three witnesses present at the making of it ; or unless it was made in the testator's last sickness, and be reduced to writing within six days after the testator's death. This regulation has been incorporated into the statute law of this country ; but even these legislative precautions were insufficient to prevent the grossest frauds and perjury in the introduction of nuncupative wills. The whole subject underwent a thorough and searching discussion in the court of errors, in 1822, when it was held that a nuncupative will is not good, unless it be made when the testator is *in extremis*, or overtaken by sudden and violent sickness, and has not time to make a written will. (*Prince v. Hazleton*, 20 *John.* 502.) That case, no doubt, afforded the reason for the legislature, in 1830, to change the law, and they did so by enacting that no nuncupative or unwritten will bequeathing personal estate, should be valid unless made by a soldier while in actual military service, or by a mariner while at sea. (2 *R. S.* 60, § 22. 3 *Id.* 141, 5th ed. *Revisers' Notes*, 3 *R. S.* 630.) It is now required, in the English ecclesiastical courts, that a nuncupative will be proved by evidence more strict and stringent than that applicable to a written will, even in addition to all the requi-

sites prescribed by the statute of frauds. (*Lemann v. Bonsall*, 1 *Add.* 389.) And by the new statute of wills, already referred to, (1 *Vict. ch.* 26,) nuncupative wills are rendered invalid except when made by a soldier in actual military service, or a mariner, or seaman, being at sea.

The further consideration of this subject appropriately falls under a subsequent chapter, when we shall treat of the form and manner of making wills and codicils. (*See post*, *ch.* 2, § 3.)

CHAPTER II.

OF MAKING, REVOKING AND REPUBLISHING WILLS, AND HEREIN OF THE PERSONS CAPABLE OF MAKING A WILL OR CODICIL.

We prefer to consider this subject more particularly with reference to wills of personal property, because it is with that class of wills that the executor is principally concerned. Reference, however, will occasionally be made to the law relative to devises, and a distinct section will be inserted, in its proper place, giving a history of the jurisdiction of surrogates' courts over the proof of wills of real estate, and pointing out the mode of conducting such proceedings, and the effect thereof. But as the testamentary capacity required to make a will of real estate, is the same as that needed for a will of personal estate, and as the form and attestation of both are in all respects alike, it does not seem to be necessary that the two classes of wills should be separately treated. With respect to the disposing of real estate by will, the persons laboring under disabilities are idiots, persons of unsound mind, married women and infants. (2 *R. S.* 57, § 1.) The disability arising from coverture is not without its qualifications, as will be seen hereafter.

The same disabilities extend to the making a will of personal estate; except that every male person of the age of eighteen years or upwards, and every unmarried female of the age of sixteen years or upwards, of sound mind and memory, are permitted to bequeath their personal estate, by will in writing. (2 *R. S.* 60, § 21.) The terms *unsoundness of mind* and *non compos mentis* are con-

vertible terms, and mean the same thing. (*Stanton v. Wetherwax*, 16 Barb. 262.)

It may be laid down generally, that all persons are capable of disposing of their property by will, who have sufficient capacity to make a contract, are under no improper restraint, and have not been convicted of any crime to which civil death or forfeiture is attached, or which suspends the civil rights of the convict. We shall consider these three grounds of incapacity; 1. The want of a testamentary capacity; 2. Improper restraint; and 3. The conviction for crimes which work a disqualification.

SECTION I.

Of persons incapable from want of testamentary capacity.

In this class, at common law, are to be reckoned infants under the age of fourteen years if males, and twelve if females. At these ages the Roman law allowed of testaments; and the civilians agree that the ecclesiastical courts follow the same rule. The New York revised statutes, it has been seen, so far altered the common law, in this respect, as not to permit males till of the age of eighteen years, nor females till of the age of sixteen years, to bequeath their personal estate by will. (2 R. S. 60, § 21.) In England, the statute 1 Victoria, chapter 26, has entirely abolished the testamentary capacity of infants, and provided that no will made by a person under the age of twenty-one years shall be valid. This act took effect in 1838. There is a tendency in the legislation of the different states to fix the age at which a person, whether male or female, may make a will, either of real or of personal estate, at twenty-one years. Such is now said to be the law in Massachusetts, Delaware, Michigan, Pennsylvania, New Hampshire, Maine, Indiana, New Jersey, and probably of some others. (1 *Jarman on Wills*, by *Perkins*, 29.)

In some of the states the nature of the property to be disposed of, as whether it be real or personal, determines the age of testamentary capacity. Thus, in Rhode Island, Virginia, Arkansas, Missouri and North Carolina, persons whether male or female may dispose of personal property by will at eighteen years of age, and of real estate at twenty-one. In Connecticut the testator or tes-

tatrix must be twenty-one to devise real estate, and at seventeen may bequeath personal estate.

In other states there is a difference made between males and females with respect to testamentary age. In Maryland and Kentucky, the age required for the validity of a will of real, and in Mississippi for the validity both of a will of real and a will of personal estate, is twenty-one in males and eighteen in females. In Illinois the age of twenty-one years is required for males, eighteen for females as to real estate, and seventeen years for both males and females as to personal estate. (1 *Jarman on Wills*, Perkins' ed. 30.) In this state it has been seen that the age of twenty-one is required for all persons, whether male or female, as to real estate, but a male at eighteen and a female at sixteen years of age may make a valid will of personal estate.

The legislation of the different states has been in some measure fluctuating on this point. The tendency obviously is to adopt the uniform rule prescribed by the late English statute of wills, 1 Victoria, chapter 26, and to abolish entirely the testamentary capacity of all persons under the age of twenty-one years.

When an infant has attained the proper age, he or she may make a will without or against the consent of their tutor, father or guardian. (1 *Bac. Abr tit. Wills*, B. 2.) But though no objection can be admitted to the will of an infant of eighteen, if a male, and sixteen if a female, merely for want of age; yet if the testator was not of sufficient discretion, whether of the age of sixteen or sixty, the instrument is invalid.

The language of the revised statutes, which gives the power to a female person of the age of sixteen years or upwards, *not being a married woman*, and *no others*, to bequeath their personal property by will in writing, has occasioned a doubt, whether a married female infant of the age of sixteen years or upwards, could execute a testamentary instrument, under a power of appointment, either as to her real or personal estate. But the right to do so was upheld by the chancellor. (*Strong v. Wilkin*, 1 Barb. Ch. 12.)

An idiot, that is a fool or madman from his nativity, who never has any lucid intervals, was at common law incapable of making a will. (*Beverley's case*, 4 Coke, 124 b. *Stewart's Executor v. Lisenard*, 26 Wend. 255. *Blanchard v. Nestle*, 3 Denio, 37.)

The revised statutes did not in this respect create a new incapacity, but merely recognized one that had existed from the earliest records of the law. An idiot is described to be a person who cannot number twenty, tell the days of the week, does not know his own father or mother, or his own age. But these circumstances, though they be evidences of idiocy, yet they are too narrow and conclude not always; for whether idiot or not is clearly a question of fact, referable to the circumstances of each particular case. If an idiot should make his will so well and so wisely in appearance that the same may seem rather to be made by a reasonable man than by one void of discretion, yet this testament is void in law. (*Swinb. pt. 2, § 4, pl. 5. 7 Bac. Abr. tit. Wills, b. 1. 2 Dean's Med. Jur. 466.*) Chancellor Kent, in *Van Alst v. Hunter*, (5 *John. Ch.* 161,) says that the failure of memory is not sufficient to create the incapacity unless it be quite total, or extend to his immediate family and property. The Roman law (*Code 6, 24, 14, and note 55,*) seemed to apply the incapacity only to an extreme failure of memory, as for a man to forget his own name, *fatuus præsumitur qui in proprio nomine errat*, and the supreme court in *Jackson v. King*, (4 *Cowen*, 207,) sanction the same doctrine. The unsoundness of mind which by the statute works a total incapacity for making a will, means a total deprivation of understanding, which is denominated idiocy. (*Blanchard v. Nestle*, 3 *Denio*, 37. *Stewart v. Lispenard*, 26 *Wend.* 255.) In another case, in speaking of the capacity to make a deed which depends upon the same principle, Ch. J. Bronson says: "in the absence of fraud, proof of mere imbecility of mind in the grantor, however great it may be, will not avoid the deed. There must be a total want of understanding." (*Osterhout v. Shoemaker*, 3 *Denio*, 37, *note. And see also, to the like effect, Odell v. Buck*, 21 *Wend.* 142, and *Petrie v. Shoemaker*, 24 *id.* 85.)

One who is deaf and dumb from his nativity is in presumption of law an idiot, and therefore incapable of making a will; but this presumption may be rebutted, and if it sufficiently appears that he understands what a testament means, and has a desire to make one, then he may by signs and tokens declare his testament. (*Swinb. pt. 2, § 4, pl. 5, 7.*) One who is not deaf and dumb by nature, but being once able to hear and speak, if by some accident

he loses both his hearing and the use of his tongue, then, in case he be able to write, he may with his own hand write his last will and testament. (*Id.* § 10. 4 *Burns' E. L.* 60.) But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, i. e. if he has understanding he may make his testament by signs, otherwise not at all. (*Id.*)

Such was the ancient common law on this subject. The enlightened philanthropy of modern times has taken a less gloomy view of the condition of those who are idiots from their nativity. It has done for them what had before been done for the blind, the deaf and dumb, and for lunatics. It has established an asylum which looks to the education of idiots, thus repelling the presumption of their total mental incapacity. (*L. of 1851, p. 941, ch. 502.*) And it is understood that the institution has been attended with promising results.

As the revised statutes prescribe the form by which a will is to be made and attested, which requires the testator to *declare* the instrument to be his last will and testament, in the presence of two witnesses, who are required to sign their names as witnesses, *at the request* of the testator, (2 *R. S.* 63,) a literal compliance with the statute cannot be accomplished when the testator is deaf and dumb, or blind. But the statute will admit of a more liberal interpretation. When ideas cannot be communicated by oral discourse, they may be transmitted by signs or by writing. Some persons born deaf and dumb have shown great intelligence; much more is this predicable of those who have become deaf and dumb later in life. It would be a reproach to the jurisprudence of the country if such persons could not dispose of their property by will. In *Gombault v. The Public Administrator*, (4 *Bradf.* 226,) the will of a person who had been for several years entirely deaf, was admitted to probate. The communications were made to him by writing on a slate, and receiving his answers orally. The surrogate of New York held, very properly, that it was competent to perform the ceremonies of executing the will, in that mode, under the circumstances, the reading and signing of the will, the affirmative response of the testator, to the question whether it was his will, followed by the signature of the witnesses in his

immediate presence, constituted a valid testamentary act, involving a substantial rogation of the witnesses.

A testament written wholly by the testator's own hand is called a *holograph*. A *holographic* instrument affords *prima facie* evidence that the testator was in his senses when he wrote it; unless the presumption is repelled by internal evidence of derangement, or by extrinsic evidence.

Such as can speak and cannot hear, may make their testaments as though they could both speak and hear, whether that defect came by nature or otherwise. Such as are only deaf but not dumb, may make their testaments. Such as be speechless only and not void of hearing, if they can write may very well make their testaments themselves by writing; if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present. (*Swinb. part 2, § 10, pl. 2. Godolph. pt. 1, ch. 11. Gombault v. The Public Administrator, 4 Brad. Sur. R. 226. 1 Wms. Ex'rs. 17.*)

Persons born blind, or who have become so after birth, may nevertheless make a will; but in the absence of any special statutory provision in their favor, they must conform, as far as practicable, to the requirements of the statute. The old authorities required that the will should be read before witnesses, and in their presence acknowledged by the testator for his last will. (*Swin. pt. 2, § 11. Godolph. pt. 1, ch. 11.*) As the object of reading over the will to the testator in the presence of the witnesses, is to make it certain that he approved its contents, if it can be made to appear that he knew the contents of the will at the time he executed it, and that it was conformable to his intentions, it is sufficient. (*Fineham v. Edwards, 3 Curteis, 63.*) In *Barton v. Robins, (3 Phillim. 454, note,)* Sir George Hay observed that a blind man's will may be established on proof that he knew the contents, though it was not read over to him in the presence of the subscribing witnesses. And in *Longchamp v. Fish, (2 New R. 415,)* the same point was established in relation to a will of lands. In *Wren v. Fitzgerald, (2 Bradf. Sur. Rep. 42.)* the surrogate recommends that the will of a blind man should be read to him in presence of the subscribing witnesses.

The same precautions necessary for authenticating the will of a

blind man, seem in like manner requisite in the case of an illiterate person, who cannot read. For though the law in other cases may presume that the person who executes a will knows and approves of the contents thereof; yet that presumption ceases, when by defect of education he cannot read, or by sickness he is incapacitated to read the will at that time. The New York revised statutes have provided that in case the testator cannot write his name, and his signature is subscribed to the will by another person, that person must also write his own name to the will as a witness, under the penalty of fifty dollars; but his omission to do so, nevertheless does not invalidate the will. (2 R. S. 64, § 41.) Though the statute does not require it, it has been strongly recommended that, when the person executing the will is not known to the subscribing witnesses to be capable of reading and writing, especially if he executes the will as a marksman, that the whole will should be deliberately read over to him in the presence and hearing of the witnesses, and the fact of such reading in his presence should be stated in the attestation clause. In case this is not done, the witnesses should, by inquiries of the illiterate testator himself, ascertain the fact that he was fully apprised of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property. All these things, however, says the chancellor, are matters of precaution and prudence, to prevent any well founded doubt upon matters of fact; and when they are neglected it does not necessarily render the will invalid, if the court and jury which are to pass upon the question of its validity are satisfied, upon the whole evidence, that the will was duly executed, and that the testator understood its contents. (*Chaffee v. Baptist Miss. Convention*, 10 Paige, 90, 1, per Walworth, chancellor.)

In *Barton v. Robins*, (*supra*,) it was observed that in point of law, if the writer of the will was benefited thereby, e. g. made a legatee, *he must show that the contents of the will were known to the testator*. In a leading case on this subject, it was held that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of

which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. (*Barry v. Butlin*, 1 *Curt. Eccl. R.* 637. *Crispell v. Dubois*, 4 *Barb.* 397.)

It is not usual to have the will read in the presence of the witnesses, nor is it necessary in any case. If the testator knows the contents at the time of publication, it is enough. Publication itself is presumptive evidence that the testator was apprised of what the will contained. It is only when circumstances of suspicion are shown, that the party seeking to establish the will can be required to show that the testator had heard it read, or knew of its contents. When it is shown that the testator is deprived of his hearing, or seeing, or that he is a very illiterate person, or that the party by whom it was prepared derives a benefit under it, a prudent jealousy seems to require some evidence of the testator's acquaintance with the contents of the instrument, in addition to the presumption derived from publication. But every case must depend on its own circumstances.

The statute disqualification of *unsound mind* embraces every other form of mental incapacity, not amounting to idiocy. The phrase *unsoundness of mind*, has been sometimes objected to, but without reason. (1 *Beck's Med. Jur.* 571.) It seems to have come into use as a technical expression, soon after the proceedings of the courts were required to be in English instead of Latin. Lord Hardwicke, in *Ex parte Barnsley*, (3 *Atk.* 171,) in speaking of the form of a return to an injunction of lunacy, says that the ancient form, when the proceedings were in latin, was *lunaticus* or *non compos mentis*, or *insane mentis*, and since proceedings have been in English, of *unsound mind*, which amounts to the same thing. The subject of mental alienation arises in a variety of forms. Very frequently, embarrassing questions are suggested in executing a commission in the nature of a writ *de lunatico inquirendo*, and by the proper return to which the courts obtain jurisdiction to appoint a committee of the person and estate. At other times the question arises on an indictment for a criminal offense, when the accused claims immunity on the ground of this dreadful visitation. Again the controversy arises as to the legal capacity to make a will or a deed, or other contract. Although in all these

cases there are some principles which are common, yet there are diversities arising from their different application. The subject in all its bearings belongs to and has been well treated in numerous works on medical jurisprudence, to which the studious reader is referred. (*See 1 Beck's Med. Jur.* 534 to 661. *Dean's Med. Jur.* 457 *et seq.* *Guy's do.* 278 *et seq.*) In this work we have only room to treat the subject in a brief and general way, so far as it relates to the testamentary capacity of testators.

A lunatic, or person *non compos mentis*, or which is the same thing, a person of unsound mind, (*Blanchard v. Nestle*, 3 *Denio*, 42,) is one who has had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is, indeed, properly one that hath lucid intervals; sometimes enjoying his senses and sometimes not; and that, as was formerly supposed, frequently depending on the changes of the moon. But under the general name *non compos mentis*, (which Sir Edward Coke says is the most legal name,) are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease; those that grow deaf, dumb, blind, not being born so. (*Beverly's case*, 4 *Coke*, 124. 1 *Bl. Com.* 304.)

Between this condition of the human mind and its brightest state of unclouded intelligence, there are infinite grades, though perhaps not easily marked by definite boundaries. But it is the unvarying doctrine of the English books, that the man of mean understanding, yea, though he incline to the foolish sort, is not prohibited to make a testament. (*Swinb.* 127, 8.) This ancient rule is thus expressed by a late text writer on this subject, (*Shelford on Lunacy*, 37,) and approved by the court of errors in *Stewart v. Lisenard*, (26 *Wend.* 301.) "A person's being of weak understanding, so he be neither an idiot or lunatic, is no objection in law to his disposing of his estate. Courts will not measure the extent of people's understanding or capacities; if a man, therefore, be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions." (*See also Jackson v. King*, 4 *Cowen*, 217; *Blanchard v. Nestle*, 3 *Denio*, 42; *Odell v. Buck*, 21 *Wend.* 142.)

A lunatic, during the time of his insanity or the paroxysm of the disease, cannot make a testament nor dispose of any thing by

will. "So strong is this impediment of insanity of the mind, that if the testator make his testament, after this furor has overtaken him, and while as yet it possesses his mind, although the *furor*, after departing or ceasing, the testator recover his former understanding, yet does not the testament made during his former fit recover any force or strength thereby." (*Swinb. pt. 2, § 3, pl. 2. Godol. pt. 1, ch. 8, § 2.*)

The general principles in relation to testamentary capacity are well understood. The great difficulty consists in applying them to the testimony in each particular case. On one occasion the chancellor said that the testator must be of sound and disposing mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment, in reference to the situation and amount of such property, and to the relative claims of the different persons who are or might be the objects of his bounty. (*Clark v. Fisher, 1 Paige, 173. Clark v. Sawyer, 2 Barb. Ch. 411; S. C. 2 Comst. 498. Marquis of Winchester's case, 6 Coke's R. 23. Den v. Johnson, 2 South. R. 458.*)

The sanity of a testator is presumed, until the contrary appears. The burden of proof, as to mental capacity, lies on the party who alleges insanity. (*Jackson v. Van Dusen, 5 John. R. 144.*) If he succeeds in proving that the testator had been affected by habitual derangement, then it is for the other party, who claims under the will, to adduce satisfactory proof that at the time of making the will the testator had a lucid interval, and was restored to the use of his reason. (*2 Phil. Ev. 7th Lond. ed. 293. Jackson v. Van Dusen, 5 John. 144. Evans v. Thomas, 2 Hag. 433.*)

Lord Thurlow, in one case, observed that the evidence of a lucid interval, after the proof of a general derangement at any particular period, should be as strong, as when the object of the proof is to establish derangement. This rule has been justly questioned. It is no doubt true that when derangement has been proved, a lucid interval must be satisfactorily established. But there appears to be no reason for requiring in the proof of these several facts, precisely the same measure of evidence, or the same degree of demonstration. It is possible that both facts may be most satisfactorily established, though the proof in the one case may, perhaps, not be so strong or demonstrative as in the other.

Insanity, from its peculiar nature, admits of more easy and obvious proof, than the existence of a lucid interval. The wildness and unnatural appearance of insanity can never be misunderstood; but whether light and reason have been restored, is often a question of the greatest difficulty. (2 *Phil. Ev.* 7th ed. 294.) Sir John Nicholl in *White v. Dows*, (1 *Phill. R.* 88,) very justly observes "that it is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognizes acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact."

It is, perhaps, proper in this place to consider some of the cases which have been decided on this branch of the subject. It is undeniably true that a lunatic person may have clear or calm intermissions of the disease. Such intermission is usually denominated a lucid interval. During the quietness and freedom of mind which occurs in such an interval, it is well settled that he may make his will disposing of his property and appointing his executors. The establishment of a lucid interval repels, for the time being, the presumption of incapacity resulting from the proof of insanity. The proof of such remission of the disease, as well as the proof of the original incapacity, is often to be extracted from contradictory testimony, mingled, it may be, with the opinions and prejudices of the witnesses. These considerations should inspire the court with caution, and admonish it to form its judgment by facts proved and by acts done, rather than by the judgments of others. (See remarks of Sir John Nicholl in *White v. Driver*, *supra*; *Brogden v. Brown*, 2 *Adol.* 441.)

One of the most remarkable cases on record, and which best seems to illustrate the doctrine of a lucid interval, occurred in England in 1809, in the case of *Cartwright v. Cartwright*, 1 *Phillim.* 90.) An abridgment of the case is essential in order to present the principles decided. In that case it appeared that the testatrix was early in life affected with the disorder of her mind; she was afterwards supposed to be perfectly recovered, and continued for several years to conduct a house and establishment of her own, as a rational person; but her habit and condition of body, and her manner for several months before the date of her

will, were those of a person afflicted with many of the worst symptoms of insanity, and continued so after making the will. She was attended by her physician, who desired the nurse and other servants to prevent her from reading and writing, as such occupation might disturb her head; and, in consequence thereof, she was for some time kept from the use of books, and writing materials; however, some time before writing the will, she became very importunate for the use of pen and paper, and frequently asked for them in a very clamorous manner. The physician, in order to quiet and gratify her, consented that she should have them, telling her nurse and other servants that it did not signify what she might write, as she was not fit to make any proper use of them. As soon as her physician had given permission, pen, ink and paper were carried to her, and her hands, which had for some time been kept constantly tied, were let loose, and she sat down at her bureau, and desired her nurse and servants to leave her alone while she wrote. They went into an adjoining room and watched her; at first she wrote upon several pieces of paper, and got up in a wild and furious manner, and tore the papers and threw them into the fire one after another. After walking up and down the room many times, in a wild and disordered manner, muttering to herself, she wrote the will. She inquired the day of the month, and an almanac was given her by one of the nurses, and the day pointed out to her. She then called for a candle to seal the paper, which was given to her, and used by her for that purpose, although they used generally to be cautioned not to trust her with a candle, and were forced to hold it at a distance from her when she read the newspaper. The survivor of the two witnesses to the transaction deposed, that in her opinion the testatrix had not then sufficient capacity to be able to know what she did, and that during the time she was occupied in writing, which was upwards of an hour, she by her manner and gestures showed many signs of insanity. The will was written in a remarkably fair hand; and without a blot or mistake in a single word or letter; *and it was a proper and natural will, and conformable to what her affections were proved to be at the time, and her executors and trustees were very discreetly appointed.* Two months after the writing of the will, in a conversation with the mother of the parties benefited by the will, the testatrix mentioned

that she had made a will, and ordered her servant to bring it, and she then delivered it to her mother, observing that there was no need of witnesses, as the estate was all personal and the will in her own handwriting. Sir W. Wynne pronounced the will to be the legal will of the deceased, and further said that in his apprehension the forming of the plan, and pursuing and carrying it into effect with propriety and without assistance, would have been sufficient to establish an interval of reason, if there had been no other evidence; but it was further affirmed by the recognition and delivery of the will. From this sentence an appeal was interposed to the high court of delegates, who affirmed the judgment of Sir William Wynne. (1 *Phillim.* 122.) That very eminent judge, in the course of giving sentence below, after remarking that the court did not depend on the opinion of the witnesses, but on the facts to which they deposed, delivered the following observations:

“The strongest and best proof that can arise as to a lucid interval, is that which arises from the act itself of making the will; that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act, rationally done, the whole case is proved. What can you do more to establish the act; because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act, rationally done. In my apprehension, when you are able completely to establish that, the law does not require you to go further; and the citation from Swinburn (*pl.* 2, § 3, *pl.* 14,) states it to be so. The manner he has laid it down is, ‘If a lunatic person, or one that is beside himself, at some times but not continually, makes his testament, and it is not known whether the same was made while he was of sound mind and memory or not, then in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermission, and so the testament shall be adjudged good; yea although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, nevertheless I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.’ Unquestionably, (continues Sir Wm. Wynne,)

there must be a complete and absolute proof that the party who had so framed it, did so without assistance. If the fact be so that he has done as rational an act as can be, without any assistance from another person, what there is more to be proved I don't know, unless the gentleman could prove by any other authority or law, what the length of the lucid interval is to be, whether an hour, a day or a month. I know no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient." In accordance with the foregoing principles, Sir John Nicholls, in *Scruby v. Fordham*, (1 Add. 90,) adopts the general rule that when a will is traced into the hands of a testator, whose sanity is once fairly impeached, but of whose sanity or insanity at the time of doing or performing some act, with relation to that will, there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character broadly taken, of the act.

In the case of *McAdam v. Walker*, (1 Dow, 178,) Lord Chancellor Eldon mentioned that he had been concerned as counsel in a cause where a gentleman who had been for some time insane, and who had been confined till the hour of his death in a mad-house, had made a will while so confined. The question was whether he was of sound mind at the time of making this testament. It was a will of large contents, proportioning the different provisions with the most prudent and proper care, with a due regard to what he had previously done to the objects of his bounty, and in every respect pursuant to what he had declared before his malady he intended to have done. It was held that he was of sound mind at the time.

In the three last cited cases the act was not only done and completed by the testator himself, *but the will was proper and natural*. That this is an important if not an indispensable ingredient to establish the sanity of the testator, in cases of this nature, may be inferred from the case of *Clark v. Lear*, (1 Phill. 119.) In that case the will was written by the testator himself, and with great accuracy, but was made in favor of a person to whom he had no good cause whatever to give a benefit. It was held that the act of framing such an instrument furnished no proof of

a lucid interval. The result of the cases seems to authorize us in saying, that proving that the testator drew his will without assistance when the will appears to be regularly and orderly written, and makes a proper and natural disposition of the estate, so as to conform to what may be supposed to be the affections and wishes of a person in his situation, constitutes of itself evidence of a lucid interval, a previous derangement having been shown.

Those cases have carried the doctrine to its extreme length, but they have never been overruled either in England or in this country; but on the contrary are recognized by elementary treatises on both sides of the Atlantic, as good law. (2 *Phil. Ev. 7th Lond. ed.* 295. 1 *Wms. Ex'rs*, 21 *et seq.* 2 *Greenl. Ev.* § 689. *Dean's Medical Jurisprudence*, 528, 529. 1 *Jarman on Wills*, 67 *et seq.*) In a recent case in the ecclesiastical courts at doctors commons, (in 1852,) Dr. Lushington, in delivering his judgment in *Bannatyne v. Bannatyne*, (14 *Eng. Law and Eq. Rep.* 595,) and referring to the opinion of Sir William Wynne, in *Cartwright v. Cartwright* that a rational act done in a rational manner was the strongest and best proof of a lucid interval, observed, that he could not altogether subscribe to that opinion, though he admitted that to a certain extent a rational act done in a rational manner, though not the strongest and best proof of a lucid interval, did contribute to the establishment of a lucid interval. In *Hix v. Whittemore*, (4 *Metc.* 545,) the case of *Cartwright v. Cartwright*, is cited with approbation, though this precise point was not the question before the court. In *Gombault v. The Public Administrator*, (4 *Bradf. Sur. Rep.* 239,) the case of *Cartwright v. Cartwright* is cited, and the great influence of the nature of the act, upon the evidence of a lucid interval is admitted, without however acceding to the entire length and breadth of the views, on this subject, of Sir William Wynne.

The difficulty of proving a lucid interval is greater in the case of permanent, proper insanity, than in the case of delirium. The reason of this is given by Sir John Nicholl, in *Brogden v. Brown*, (2 *Adol.* 445.) "In cases of permanent, proper insanity," he observes, "the proof of a lucid interval is matter of extreme difficulty, for this among other reasons, namely, that the patient so affected is not unfrequently rational to all outward appearances,

without any real abatement of his malady ; so that in truth and substance, he is just as insane, in his apparently rational, as he is in his visible raving fits. But the apparently rational intervals of persons, merely delirious, for the most part, are really such. Delirium is a fluctuating state of mind, created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is most commonly really sane. Hence, in most instances in cases of delirium, the probabilities in favor of a lucid interval are infinitely stronger in a case of delirium, than in one of permanent, proper insanity ; and the difficulty of proving a lucid interval is less in the same exact proportion in the former than it is in the latter case.

The doctrine which has been hitherto considered has originated in cases of *general* insanity. But the question will sometimes arise, whether the existence of *partial insanity* will, under any and what circumstances, be sufficient to invalidate a will. The weight of authority on this subject seems to be that if the testamentary act can be traced to the morbid delusion, and is the result of that delusion, then the act is invalid, though the testator at the time of making the will, was sane in other respects, upon ordinary subjects. A brief reference to a few of the cases on this subject will be sufficient to illustrate the doctrine.

The first to which we will refer is that of Greenwood, (stated in *White v. White*, by Lord Erskine, 13 Ves. 89.) Mr. Greenwood was bred to the bar, but becoming diseased, and receiving in a fever a draught from the hand of his brother, the delirium taking its ground then, connected itself with that idea, and he considered his brother as having given him a potion with a view to destroy him. He recovered in all other respects, but that morbid image never departed ; and that idea appeared connected with the will, by which he disinherited his brother, who was his only next of kin. Two conflicting verdicts were had in the case, at common law. The suit ended in a compromise. On the trial of the cause, before Lord Kenyon, his lordship, in his charge to the jury, after remarking on the conduct of the deceased towards his brother, which had been detailed in the evidence, amongst other things said: "It is for you to look at that conduct to his brother, to see whether it is evidence of derangement of mind, or whether only

an unreasonable prejudice which he indulged against his brother; if it be the last, that did not unfit him to make his last will and testament." "If you think that whenever that topic occurred to him, it totally deranged his mind and prevented him from judging of who the objects of his bounty should be, according to his own will, then the will cannot stand, and then you will find for the defendant; but if you think he was of competent mind to make his will, to exercise his judgment, however that might be disturbed by passions which ought not to be encouraged, then the will ought to stand." (3 *Curteis*, App. 30 *et seq.* 1 *Jarman on Wills*, Perkins' ed. 60.)

The case of *Dew v. Clark* is a strong case upon the same point. (1 *Add.* 279. 3 *id.* 79.) It must be considered as establishing the doctrine, that partial insanity will invalidate a will which is fairly inferred the direct offspring of that insanity. There the case pleaded by an only daughter in a responsive allegation, in the prerogative court, in opposition to her father's will, was, that besides laboring under mental perversion in some other particulars, especially on religious subjects, the deceased had an *insane* aversion to his daughter, and was actuated solely by that illusion to dispose of his property in the manner in which it was purported to be conveyed by the contested will. This allegation was opposed as inadmissible, on behalf of parties claiming under the will. But Sir John Nicholl admitted it, and after remarking that the case set up was one of partial insanity, as to a particular person, and approving the dictum in *Greenwood's case*, (*supra*) he observed "that the burden of proof was upon the daughter, who contested the will, and that she must understand that no course of harsh treatment—no sudden bursts of violence—no display of unkind or even unnatural feeling merely, can avail in proof of her allegation. She can only prove it by making out a case of antipathy, clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity." After the evidence had been gone through on both sides, the same learned judge delivered his judgment that the will being proved to be the direct unqualified offspring of a morbid delusion, as to the character and conduct of the daughter, being the very creature of that morbid delusion, put into act and energy, the deceased

must be considered insane at the time of making the will, and consequently the will itself was null and void in law. (3 *Add.* 208.) The subject of partial insanity was elaborately and ably discussed by the learned judge, but we have not room for his observations. This judgment was afterwards confirmed by the court of delegates. A commission of review was then applied for, before the Lord Chancellor (Lyndhurst,) but refused. (5 *Russ. Ch. Cases*, 163.)

The same doctrine has been acted upon in this state. Thus, in *Waters v. Cullen*, (2 *Bradf. Rep.* 354,) the will of the testatrix was successfully contested, and was set aside on the ground of insanity. The testatrix died of *delirium tremens*, to which disease she had been subject more or less for some time before her death. She gave her property, consisting of a house and lot in the city of New York, to her children by her first husband, and left her children by her last husband, penniless. She advanced as a reason for this, that the property in question came from the estate of her first husband. It appeared, also, that at the time she made the will she believed that she had been poisoned by the father of the children whom she left unprovided for. The surrogate thought that she labored under an insane delusion in both respects, and though both the subscribing witnesses thought the mind of the testatrix sound, the surrogate believing that she acted under an insane delusion, as abovementioned, rejected the will.

In connection with the subject of partial insanity it may be proper here to remark, that by the Roman law testaments might be set aside as being *inofficiosa*, deficient in natural duty, if they totally passed by (without assigning a true and sufficient reason,) any of the children of the testator; though if the child had any legacy, however small, it was proof that the testator had not lost his memory or his reason, which otherwise the law presumed. But our law makes no such constrained supposition of forgetfulness or insanity. And therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such testament. (2 *Bl. Com.* 503.)

But the ecclesiastical courts require evidence of full and entire capacity in the testator to support a will which is *inofficious*, and not consonant with the testator's natural affections and moral duties; and especially when it is obtained by the party materially

benefited by it. In such cases it is said there must be direct evidence of instructions, especially if the testator's capacity is in any respect doubtful. (*Brogden v. Brown*, 2 *Add.* 441, 449. 3 *id.* 207, 208.) The strictness of the rule of evidence in such cases is by way of precaution, for our law considers that the natural affection of parents for their children, will prevent any abuse from the unlimited power which is given of disposing of property by will. And, therefore, there is no doubt that the testator may devise all his estate to strangers and disinherit his children, if he pleases. But the circumstance that the parent, without cause, has disinherited his child, or that any other testator has bequeathed his estate in a manner contrary to his moral duties and natural affections, will always have great influence in establishing the fact of insanity. On the other hand, the inference to be derived from this circumstance, adverse to the testator's sanity, may be repelled by showing a satisfactory reason for the testamentary disposition.

The subject of *moral insanity* is properly referable to this branch of our discussion. The attention of the medical profession was first directed to this form of malady by Pinel, about the commencement of this century. The disorder is defined by some of the writers as "consisting in a morbid perversion of the natural feelings, affections, inclinations, temper, habits, and moral dispositions, without any notable lesion of the intellect, or knowing and reasoning faculties, and particularly without any maniacal hallucination." (*Guy's Forensic Med.* 306. *Dean's Med. Juris.* 496.) The subject was much discussed in *Frere v. Peacocke*, (3 *Hagg.* 527, 547.) And it was held that moral insanity or the perversion of the moral feelings not accompanied with insane delusion, which is the legal test of insanity, is not sufficient to invalidate a will.

It is principally in criminal cases that the question as to the existence of this form of insanity arises. The consideration of this class of cases does not fall within the scope of the present work, and the cases are no further important, than as they afford illustrations of the general subject of mental disease. The subject was much considered in this state, in *Freeman v. The People*, (4 *Denio*, 9,) and on the subsequent trial of the said Freeman in the Cayuga O. and T. in July, 1846. (*See Report by B. F. Hall, Esq.*) The question, in 4 *Denio*, arose on the charge to the jury,

on the preliminary trial, whether the accused was sufficiently sane to be required to plead. The jury under the instruction of the court, having found that the prisoner was sufficiently sane in mind and memory to distinguish between right and wrong, and the court having accepted the verdict and proceeded to try the prisoner, and refused to charge the jury to find whether the prisoner was sane or insane, the question amongst others, was brought before the supreme court, by writ of error. The decision of the supreme court is no further important in this connection, than as it goes to show that the courts recognize a state of partial insanity. Partial insanity, says the judge, (*p.* 29,) is not by law necessarily an excuse for crime, and can only be so when it deprives the party of his reason in regard to the act charged to be criminal.

There does not appear to be any reason for recognizing moral insanity as a distinct disease. It may perhaps, without impropriety, be treated by writers on medical jurisprudence, as a distinct disease, or as one of the forms of mental alienation. For all legal purposes, it is enough that the law recognizes a general and a partial insanity. If the act done is proved to be referable to the influence of either, it is sufficient to invalidate it, whether it be a will or a contract.

The statute requires that the surrogate, before recording any will, or admitting it to probate, should be satisfied of its genuineness and validity. (2 *R. S.* 61, § 26, *as amended by the act of 1837, ch.* 460, § 17. 3 *R. S.* 149, § 66, 5th ed.) In addition to the classes already considered, of idiots and lunatics, there are cases of mental imbecility arising from other causes, and which may exist to such a degree as to constitute a state of unsoundness of mind, within the meaning of the law, and to disqualify the party for making a valid testamentary disposition of his property. The persons falling under this head, and whose cases most frequently are brought to the notice of the surrogate, are those who have become disqualified by the infirmities of old age, or who have made a wreck of their intellect, by drunkenness.

But old age does not, *per se*, work a disqualification. There is no period fixed by law, beyond which a man shall be conclusively adjudged to be incapable of making a testament. In this respect, governments have not guarded the second childhood of our race,

with the same legislative care that they have protected the heedlessness and inexperience of youth. They have wisely trusted each case to the evidence and sound judgment of the courts.

This subject has often been brought to the test of examination in our highest tribunals. The case of *Van Alst v. Hunter*, (5 *John. Ch.* 148,) is a leading case. The testator was between 90 and 100 years old, and infirm, at the time he made his will, in which he gave the bulk of his property to his only surviving daughter and a grandson. A bill was filed by the other heirs at law to set aside the will on account of the incompetency of the testator, who, it was alleged, was of unsound mind and memory at the time, and under improper restraint. A feigned issue was awarded by the chancellor, and the jury found in favor of the will. The cause came before the chancellor on a motion for a second trial, and on the equity reversed. After disposing of other matters, the chancellor (Kent) observed, that it is well understood, that age alone will not disqualify a person from making a will, provided the testator has a competent possession of his mental faculties. Quoting from Swinburne, part 2, § 5, he says, "a man may freely make his testament how old soever he may be, for it is not the integrity of the body but of the mind that is required in testaments." This has been the doctrine of the law in every age. And after quoting, to the same effect, from the Roman law, he adds, "The law looks only to the competency of the understanding; and neither age, nor sickness, nor extreme distress or debility of body will affect the capacity to make a will, if sufficient intelligence remains." After reviewing the facts of the case, and showing that the will itself was replete with just feeling and rational calculation, he adds: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. The will of such an aged man, ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections, dictated."

This subject has often been fully considered in the surrogate's court of New York, and the student will derive much instruction from the perusal of the sagacious observations of the learned surrogate, whose decisions have been reported. We have not room for any extended quotations from them. Thus in *Weir v. Fitzgerald*, (2 *Bradf. R.* 42,) the will of a testator 76 years of age, whose hearing was slightly affected, and sight very seriously impaired, was admitted to probate. It was, in that case, very properly held, that besides the mere formal proof of execution, something more is necessary to establish the validity of a will when, from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the formal execution. Additional evidence is required that his mind accompanied the will, and that he was cognizant of its provisions. This may be established by the subscribing witnesses, or by evidence *aliunde*.

So, also, in *Laycroft v. Simmons*, (3 *Bradf. Sur. Rep.* 35,) where the testator was eighty-nine years old, though of undoubted capacity, yet because the will was made at the house of a son, who took under the will the largest share of the estate, and who drew the will for his father without the knowledge of the other heirs, it was held that further proof of a recognition of the will should be required, than the bare fact of execution; and such proof having been given, the will was admitted to probate.

So, also, in *Creely v. Ostrander*, (3 *Bradf. Sur. Rep.* 107,) the testator was in his eighty-fourth year, and enfeebled by disease. In short he died the same day the will was executed, and only a few hours after; but his faculties were unimpaired, and proof was required and given showing that the testator executed the will, and exhibited mental activity, freedom and determination of volition.

There are cases of imbecility of mind, not arising from old age, or drunkenness, which often present embarrassing questions on the subject of testamentary capacity. The doctrine of the courts in regard to this matter was most thoroughly discussed in the court of errors in this state, in 1841, in the well known case of *Stewart's Ex'rs v. Lispenard*, (26 *Wend.* 255.) The result of that case is, that in the case of the will of a person of imbecile mind, a want of consent by the testator to a particular will may be urged, from his

inability to comprehend its effect and nature, from the dispositions of the property being contrary to what naturally might have been expected from the relative situation of the parties, the preferences, partialities, and former testamentary declarations of the testator; the absence, at the making of the will, of those to whom he commonly looked for advice; and generally from the surrounding circumstances, into which the court of probate will look with vigilance. So, on the contrary, evidence of the general knowledge and understanding of the testator that he is the owner of property, and has the power of disposing of it by will, of his previous declarations and intent as to its disposition, of his gratitude and attachment to the donee for long and persevering care and kindness; and the will itself being in a simple form, intelligible to the plainest mind, will be sufficient to justify the court to pronounce it a genuine and valid instrument.

The case also is a leading authority for the position, that mere imbecility of mind in a testator will not avoid his last will and testament. Idiots, lunatics and persons non compos mentis are disabled from disposing of their property by will, but every person not embraced within either of the above classes, of lawful age and not under coverture, is competent to make a will, *be his understanding ever so weak*. Courts, in passing upon the validity of a will, do not measure the extent of the understanding of the testator; if he be not totally deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions. (To the same effect see *Blanchard v. Nestle*, 3 Denio, 37; *Scribner v. Craue*, 2 Paige, 147; *Clark v. Sawyer*, 2 Comst. 499.)

But while the law, in tenderness to human infirmity, allows the weak as well as the strong the right of disposing of his property by will, it is careful that he should be able to do more than to answer familiar and usual questions, and that he should have a disposing memory, so as to be able to make a disposition of his property with understanding and reason; and that is such a memory as the law calls sane and perfect memory. (*Marquis of Winchelsea's case*, 1 Co. 23 a. *Clark v. Fisher*, 1 Paige, 173. *Ingraham v. Wyatt*, 1 Hagg. 401. *Bolton v. Barry*, 1 Curt. Eccl. Rep. 614.)

The remaining class under this head is that of the drunkard. He that is overcome by drink, says Swinburne, (pt. 2, § 6.) during the time of his drunkenness is compared to a madman, and therefore if he make his testament at that time, it is void in law, which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament being in that case.

In some of the cases which have been cited, the understanding of the party was destroyed by reason of habitual intoxication. Such a party can no more make a valid will than if the intellect had been impaired by a direct visitation from God. The remarks of Harrington, J., in *Duffield v. Robison*, (2 *Harrington*, 375, 383, 384,) are very appropriate to this subject, as well as just in themselves. "Drunkenness," says the learned judge, "is itself a species of insanity, and might invalidate a will made during the drunken fit; but long continued habits of intemperance may gradually impair the mind, and destroy the memory and other faculties, so as to produce insanity of another kind."

In the case of *Ayrey and others v. Hill*, in the prerogative court of Canterbury, a distinction was pointed out between a lucid interval succeeding a case of proper insanity, and the state of a person, habitually addicted to intemperance, after the excitement has passed away. Where actual, proper insanity is proved to have shown itself, either perfect recovery, or at least a lucid interval, at the time of making the instrument, must be shown, to entitle any testamentary instrument to be pronounced for as a valid will. Either of these, however, the last especially, is highly difficult of proof, for the following reasons. Insanity will often continue, though *latent*, so that a person may be in effect, completely mad or insane, however, on some subjects, and in some parts of his conduct apparently rational. But the effects of drunkenness or ebriety only subsists while the cause, the excitement visibly lasts; there can scarcely be such a thing as latent ebriety. Therefore, in the latter case, proof of the absence of the excitement, at the time of the act done, or at least the absence of it in such degree as to prevent intoxication, is enough to show the act itself valid.

In this state the chancellor formerly had the care and custody

of all idiots, lunatics, persons of unsound mind, and persons incapable of conducting their own affairs, in consequence of habitual drunkenness, and of their real and personal estate, so that the same should not be wasted or destroyed. (2 *R. S.* 52.) This duty, under the constitution of 1846, and the judiciary act, is now principally devolved upon the supreme court. While a party is under a commission granted by the court, on the return of a proper inquisition, he is, *prima facie*, incapable of transacting business or of doing any act which will bind his estate. In like manner contracts made by him before the finding of the inquisition, which are overreached by the retrospective finding of the jury, are presumptively void. (*L'Amoureux v. Crosby*, 2 *Paige*, 422.) The same effect is given to a commission against a person as an habitual drunkard. He cannot even in his sober moments, while the commission is in force, make contracts which will bind himself or his property. (*Walsworth v. Sharpsteen*, 4 *Seld.* 388.)

In *Stone v. Damont*, (12 *Mass. R.* 488,) it was held by the supreme court of Massachusetts, that a lunatic under guardianship might make a will, if he was restored to his reason, although the letters of guardianship were unrepealed. In this state the practice seems to have been to suspend the commission in part, so as to authorize the lunatic to dispose of his property by will, upon evidence that he has so far recovered as to have a testamentary capacity. (*Matter of Burr*, 2 *Barb. Ch. R.* 208.)

SECTION II.

Of persons incapable by restraint.

The revised statutes require that the surrogate, before directing a will to be recorded, as a will of real estate, or admitting it to probate, if it relates only to personal property, shall find that the testator, at the time of making the will, was in all respects competent, and *not under restraint*. (2 *R. S.* 58, as amended by the act of 1837, ch. 460, § 18; 3 *R. S.* 139, 150, 5th ed.) Under this head may be embraced all cases in which a will has been obtained, by fear, fraud, importunity, undue influence, or by a female under coverture.

A will executed under duress is void. (*Jackson v. Kniffin*,

2 *John*. 31.) A contract entered into by a party, by duress of imprisonment or duress *per minas*, is void. To constitute duress *per minas*, it is not essential that the party be threatened with loss of life or limb; or with mayhem; but it is enough if he acts from fears excited by threats of illegal imprisonment. (*Foshay v. Ferguson*, 5 *Hill*, 154.) The will of a person under restraint, either actual or by construction of law, is invalid. If it can be demonstrated that actual fear was used to compel the testator to make the will, there can be no doubt that although all formalities have been complied with, and the party perfectly in his senses, yet such a will cannot stand. (*Mountain v. Bennett*, 1 *Cox*, 355.) The old writers say, if there be at the time of bequeathing, a fear upon the testator, it could not be, as it ought to be *libera voluntas*. Yet it must be understood that it is not every fear or a vain fear that will have the effect of annulling the will; but a just fear, that is, such as that indeed, without it the testator had not made his testament at all, or at least in that manner. A vain fear is not enough; but it must be such a fear as the law intends when it expresses it by a fear that may *cadere in constantem virum*; as the fear of death, or of bodily hurt, or of imprisonment, or of loss of all or most part of his goods, or the like, (*Godol. pt. 3, ch. 25, § 8*; *Swinb. pt. 7, § 2, pl. 7*;) whereof no certain rule can be delivered, but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons, as well threatening as threatened; in the person threatened, the sex, age, courage, pusillanimity, and the like. (*Id.*) But if the testator, afterwards, when there is no cause of fear, ratifies and confirms the testament, it seems to be good in law. (*Id. pl. 8.*)

In like manner a will obtained by fraud is void, as much so, indeed, as if it was the result of fear. (*Id.*) Any undue advantage taken of the testator by which he is induced to make a will which he otherwise would not have made, vitiates the will. The proper remedy in such a case is to contest the will before the surrogate, when it is offered for probate, or to be proved as a will of real estate. It may also be contested in a court of law, in an action by the devisee of the real estate against the heirs or parties claiming under them. In *Bennet v. Wade*, (2 *Atk.* 324,) Lord Hardwicke said that it was settled and had been since the time of Lord Mac-

clesfield, that a will cannot be set aside in equity for fraud or imposition; for the reason that if it be a will of personal estate, the remedy is in the ecclesiastical courts, and a will of real estate may be set aside at law. In this state, however, Chancellor Walworth, in *Clarke v. Sawyer*, (2 Barb. Ch. 411,) asserted the power of the court, by the consent of parties, to make a decree declaring the will void for fraud; and he accordingly made such decree in that case, which was affirmed on appeal, by the court of appeals. (S. C. 2 Comst. 498.)

The cases of *importunity* generally occur in the testator's last sickness, when he is *in extremis*, and in favor of some relative near his person. In one case, a will was said to be obtained by constraint, because the testator made his will in his sickness by the over importunity of his wife. (*Harker v. Newborn, Styles*, 427.) According to Sir John Nicholl, (see *Kindleside v. Harrison*, 2 Phillim. 551, 2,) importunity in its correct legal acceptation, must be in such degree, as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased; not the free act of a capable testator; in order to invalidate the will.

In *Blanchard v. Nestle*, (3 Denio, 43,) the supreme court of this state held that a person had a right by fair argument or persuasion to induce another to make a will, and even to make it in his own favor. The procuring a will to be made by such means is nothing against its validity. In that case the alleged importunity was by the daughter upon her father. The court cite with approbation the case of *Miller v. Miller*, (3 Serg. & Rawle, 267,) in which the court say that any one has a right by fair argument and persuasion, or by virtuous influence, to induce another to make a will in his favor. (And see also *id.* 270.)

There is a difference between *control* and *undue influence*; the first approaches near to duress or fear; the last is more difficult to be described. If a wife by her virtues has gained such ascendancy over her husband, that her pleasure is the law of his conduct, such influence is no reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. Nor would it be safe to set aside a will on the ground of influence, importunity

or undue advantage, taken over his mind and conduct in the general concerns of life, unless there should be proof that such influence was specially exerted to procure a will peculiarly acceptable to her and prejudicial to others. (*Small v. Small*, 4 *Greenl.* 220.)

Very closely connected with importunity are the cases of undue influence. This arises where a dominion has been acquired by a person over another's mind of sufficient sanity for *general purposes*, and of sufficient soundness and discretion to regulate his affairs in general; yet if the influence should be such as to prevent the exercise of such discretion, it is equally incompatible with a disposing mind. (*Mountain v. Bennett*, 1 *Cox*, 355.) But the influence must be such as amounts to force and destroys free agency. It is not enough that it is the influence of affection and attachment. It must not be the mere desire of gratifying the wishes of another. To vitiate the act, the influence must be shown to have arisen from *threats, force or coercion*, destroying free agency, and the boon to have been obtained by such coercion, or by importunity that could not be resisted, producing compliance for the sake of peace. (*Gardner v. Gardner*, 22 *Wend.* 526. *Williams v. Goude*, 1 *Hagg.* 581. *Allen v. The Public Administrator*, 1 *Brad.* 378.)

A married woman was not permitted, by the New York revised statutes, to make either a will of real or personal property. (2 *R. S.* 56, § 1, *p.* 60, § 21.) In this respect they differed widely from the civil law, in which there was no distinction, a married woman being as capable of bequeathing as a *feme sole*. But anterior to the revised statutes it was well settled that a married woman might make a will of her separate personal property, which would be valid in equity; and it was not necessary that the marriage articles, or the conveyance by or through which she acquired the property, or by which it was settled to her own use, should express that she should have power to dispose of it by will: when it was established that it was her sole property which she had a right to hold free from the control or intermeddling of her husband, she was regarded by the court of chancery as a *feme sole* in respect to such property, and could dispose of it by will, or by a conveyance *inter vivos*, in the same manner which any other proprietor of such property could do. In the absence of any restriction in the marriage articles, she was free to adopt any method of disposing of it, which the law

gave to other absolute owners, except that she was disabled from making a valid covenant or agreement as to title. (*Wadham v. Amer. Home Miss. Society*, 2 Kernan, 418, per Denio, J.; S. C. 10 Barb. 597. *Peacock v. Monk*, 2 Ves. sen. 190, 191, per Lord Hardwicke. *Pettiplace v. Gorges*, 1 Ves. jun. 46. *Wagstaff v. Smith*, 9 id. 500. 1 Sugd. on Powers, 210, 211. *Juques v. Methodist E. Church*, 17 John. 548.)

Separate personal property of the wife was unknown to the common law, which considered the husband to be the owner of all the goods of the wife. (*Willard's Eq. Juris.* 634 et seq. *Clancy's Rights of Women*, p. 1, 2; per Denio in *Wadhams v. Am. Home M. Soc. supra.*) It was for this reason that the law respecting settlements to her sole and separate use, and as to titles arising out of that doctrine, was available only in the court of chancery. As all the personal estate in possession of a woman vested absolutely in her husband at the moment of marriage, and all which she acquired during coverture, immediately became his, the only subject upon which a will of personal property, executed by her, could operate, would be such as had been conveyed or settled to her separate use, and perhaps her contingent interest in her choses in action not reduced to possession, and her chattels real. (*Id.* per Denio, J.)

As the husband might waive the interest which the law bestowed upon him, he might of course empower the wife to make a will to dispose of her personal estate. His assent to his wife's will entitled the wife's executor to claim such articles of her personal estate, which would have been her husband's, as administrator.

Prior to the revised statutes there was no legislative provision respecting wills of personalty by married women. The legislature had re-enacted the material parts of the English statute of wills, (34 and 35 Henry 8, ch. 5,) and which, as revised in 1830, in effect made all wills of real estate of a married woman invalid. (2 R. S. 56, § 1.) With respect to personal property, the revised statutes introduced a new provision, by which a married woman could not give or bequeath her personal estate by will. (2 R. S. 60, § 21.)

Experience soon showed that this restriction was neither dictated by wisdom or sound policy. It led to the adoption of the act of

1848, ch. 200, and the amended act of 1849, ch. 375, (3 *R. S.* 239, 240, 5th ed.) By the first of those statutes it was enacted that the real and personal property of any female, who might thereafter marry and which she should own at the time of the marriage, and the rents issues and profits thereof, should not be subject to the disposal of her husband, nor be liable for his debts, and should continue her sole and separate property as if she were a single woman. The second section enacted that the real and personal property, and the rents, issues and profits thereof, of any female then married, should not be subject to the disposal of the husband; but should be her sole and separate property as if she were a single woman, except so far as the same might be liable for the debts of her husband theretofore contracted. Though this statute broke into the common law rule, and was a proceeding in the right direction to ameliorate the social condition of married women, it did not go far enough to effect its object. It did not confer upon married women whom it recognized as the owners of their property, the power of devising the same by will. It did not remove the restriction which coverture at common law and under the revised statutes, had interposed in this respect. But the second of these statutes, that of 1849, went further. It enacted that any married female might take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner, and with the like effect as if she were unmarried, and that the same should not be subject to the disposal of her husband nor be liable for his debts. This statute has been held to be prospective, and, so far as it may be supposed to affect rights already vested in the husband by the marriage, to be unconstitutional and void. (*Holmes v. Holmes*, 4 *Barb.* 295. *White v. White*, 5 *id.* 474. *Snyder v. Snyder*, 3 *id.* 621. *Perkins v. Cottrel*, 15 *id.* 446. *Westervelt v. Gregg*, 2 *Kernan*, 202.)

There are but few reported cases arising under the statute of 1849, which concern the office of the surrogate. As married women are by the act, competent to devise or bequeath real and personal property in the same manner and with the like effect as

if they were unmarried, it is the duty of the surrogate, on proof of the due execution, to admit the will to probate, leaving the question as to what passes under it, for future construction. The power to make a will relates to the personal capacity and the probate; the right to dispose of certain property relates to the effect of the instrument when proved, and its construction. (*Water v. Cullen*, 2 *Bradf. Sur. R.* 354. *Van Wert v. Benedict*, 1 *id.* 114.)

Wills made under a power, must be executed with the same formalities and be proved in the same manner as proper wills. They must be proved before the surrogate; but that officer has nothing to do, as a court of probate, with the question whether the power was well executed or not, or whether it authorizes the will, or in fact exists at all. This subject was fully considered by the surrogate of New York, in *Van Wert v. Benedict*, (1 *Bradf.* 114,) and the present practice of the English courts in testamentary cases approved.

It can scarcely be necessary to add that the rules which have already been considered as to capacity, are applicable, and that the circumstances which will in other cases invalidate the instrument, such as fear, fraud, undue influence, and the like, will have the same effect on the will of a married woman, as upon one made by other parties. If, then, such will be made in favor of the husband, as it may be, it will be void, provided it is brought about by the exercise of undue influence and marital authority, contrary to the real wishes and intentions of the wife. (*Marsh v. Tyrrell*, 2 *Hagg.* 84. *Mynn v. Robinson*, *id.* 169. *Burdick v. Gibbs*, 3 *John. Ch. R.* 523.)

SECTION III.

Of the persons disqualified on account of conviction for crime.

At common law, all traitors and felons were incapable of making a will, from the time of their conviction; for then their goods and chattels were no longer at their own disposal, but forfeited to the king. (2 *Blk. Com.* 499.) This incapacity was also extended to a *felo de se*, and to outlaws, so long as the outlawry subsisted. (*Id.*) It was even doubted whether a person excommunicated could make a will; but that was removed by the statute 53 Geo.

3, ch. 127, the third section of which declared that persons excommunicated should incur no civil incapacity whatever.

In this state, the law is, in a great degree, changed in all the above respects. Outlawry is abolished in all cases except on a conviction for treason. (2 R. S. 744.) As we have no church established by law, so excommunication from a church organized by voluntary association, works no civil disability.

By the constitution of the United States it is declared that no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. (*Const. art. 3, § 3, subd. 2.*) By the act for the punishment of certain crimes against the United States, passed April, 20, 1790, ch. 9, § 24, forfeiture of estate and corruption of blood were wholly abolished.

The constitution of this state adopted in 1777, prohibited all acts of attainder after the end of the revolutionary war, and the constitution of the United States prohibits the several states from passing any bill of attainder. (*Const. art. 1, § 10.*) But the constitution and laws of this state recognize the crime of treason against this state, and provide for its punishment, and for forfeiture as incident to outlawry on conviction. Such conviction works forfeiture of the lands of the convict during life, and of his goods and chattels absolutely. But the same act abolishes all forfeitures in the nature of deodands, and in cases of suicide, and when any person shall flee from justice. (2 R. S. 701, § 22.)

Thus far we have considered the incapacity to make a will as arising from the forfeiture for crime. It is supposed that there is another class of cases where the incapacity arises from a different cause. The revised statutes define *felony* to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a state prison, and no other. (2 R. S. 702, § 30.) They have substituted for the common law consequences of a conviction for a felony, certain disqualifications. Thus a person sentenced to imprisonment in a state prison for life, is thereafter to be deemed civilly dead. (2 R. S. 701, § 20.) A sentence of imprisonment in a state prison for any term less than for life, suspends all the civil rights of the persons so sentenced, and forfeits all public offices and all private

trusts, authority or power, during the term of such imprisonment. (*Id.* § 19.) In *O'Brien v. Hagan*, the New York superior court decided that the effect of the above provision was to abate any suit which might, at the time of such conviction, be pending in his favor. They declined, however, to give an opinion, whether a party in that condition could execute a valid release. It would seem, on principle, that he could not. (*Miller v. Feckle*, 1 *Parker's Cr. Rep.* 374, 377.) The right to make a will is doubtless one of the civil rights which is suspended by sentence of imprisonment in a state prison. If such convict be at the time of such sentence, an executor, administrator or guardian, the trust is forfeited, and others may be appointed in his place.

CHAPTER III.

OF THE FORM AND MANNER OF MAKING A WILL OR CODICIL.

Wills and codicils are of two sorts, written and nuncupative. Written wills are also of two sorts, such as relate to real property, called devises, and such as relate to personal property, sometimes called a testament. Both of the latter kind are with propriety called a last will and testament. Formerly there was a striking difference between the formalities required for a devise of lands and those necessary for a valid will of personal property. It is probable that the several states have prescribed different formalities in this respect. In this state, until the revised statutes of 1830 went into operation, the law was substantially like the English law, at the time of the separation of this country from Great Britain. But by those statutes, both kinds of written wills, whether relating to real or personal estate, were put upon the same footing as to the formalities of execution and attestation. In England, by the act 1 Vict. ch. 26, which took effect in this respect in 1838, the same formalities of execution and attestation are necessary, whether the instrument disposes of real or of personal estate. The provisions of our statute for the valid execution of a will or codicil of real or personal property, or both, are that it shall be executed in the following manner: 1. It shall be sub-

scribed by the testator, at the end of the will. 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator. (2 R. S. 63, § 40; p. 68, § 71, *as to codicil*.) The statute is peremptory, and nothing can be more explicit. Four ingredients as declared, must enter into, and together constitute one entire, complex substance, essential to the complete execution, (*per Nelson, Ch. J., in Remsen v. Brinkerhoof*, 26 Wend. 331.)

It is proposed to notice these formalities in the order in which they are named, and to bring to the notice of the reader the adjudications which have occurred in relation to them respectively.

SECTION I.

Of the statutory requirements for the making and attestation of a will or codicil.

Neither the signature or seal of the testator was necessary, at common law, to a will of personalty, whether the instrument was in the handwriting of the testator or in that of another man. All that was required was evidence satisfactory to the court, that the instrument propounded as a will, contained the final testamentary disposition of the testator's personal estate. With regard to a will of lands, it was otherwise; the English statute of wills, and that of this state previous to the revised statutes, requiring that it should "be signed by the party making the same, or by some other person in his presence, and by his express direction."

Questions at an early day arose as to what amounted to a *signing* by the testator. It was decided that a mark was sufficient, and that notwithstanding the testator was not shown to be unable to write. (*Baker v. Duuning*, 8 Adol. § Ellis, 94. *Jackson v. Van Dusen*, 5 John. 144.) It was held also, as well in the courts of England as here, that the writing of the name of the testator

in the body of the will, if written by himself, with the intent of giving validity to the will, was a sufficient signing, within the statute. (*Tounele v. Hall*, 4 *Const.* 145, *per Jewett*. 1 *Jarman on Wills*, *Perkins' ed.* 114, and notes.)

Thus, says Jewett, J., in the same case, the old law stood, and the mischief of it was that, as it was unnecessary for the testator to have adopted the instrument after it was finished, by actually signing the same at the close of the will, it did not denote clearly that he had perfected and completed it. To remedy this evil and to prevent future controversy as to whether a will signed by the testator, in any other part of the instrument than at the *end*, denoted a complete and perfect instrument, the revised statutes above referred to, require that "it shall be subscribed by the testator at the end of the will." And the statute of Victoria 1, ch. 26, passed in 1837, requires that "the will shall be signed at the foot or end of the will," and to avoid the misconstruction which had prevailed as to "signing," the words, "subscribed at the end of the will," are used in our statute, and the words "signed at the foot or end of the will," are used in the statute of Victoria.

In the case just cited, an instrument propounded as a will consisted of eight unfolded sheets or pieces of paper, securely attached together at the ends. The writing of the will commenced on the first and was continued on the four succeeding sheets, where it was brought to a close by the usual attestation clause, and was subscribed by the testator and the witnesses. On one of the sheets following the signature *was a map not signed by the testator or the witnesses*. The testator owned houses and lots in the city of New York which he disposed of to his widow and among his descendants. In the body of the will the lots were designated by numbers, with a reference to the map as follows: "which said lots are designated on a certain map now on file in the office of the register of the city and county of New York, (a copy of which, on a reduced scale, is hereto annexed,) entitled map of the property," &c. particularly describing the map on file. It was held by the court of appeals of this state that the will was subscribed by the testator *at the end of the will*, within the meaning of the statute, and that the execution thereof was valid.

In this case the paper referred to was treated in the same way

as if it had been actually inserted in the body of the will at the place where it was referred to therein. The subscription of the testator and the attestation of the witnesses, being at the close of the description and disposing parts of the will, were thought to be a full compliance with the statute, notwithstanding the schedule referred to in the body of the will followed the subscription and attestation.

We have seen that, under the former statute, the testator might execute the will by his mark; the statute requiring that the will should be signed by the testator, or by some other person in his presence and by his direction. The present statute requires that the will shall be *subscribed by the testator at the end of the will*; thus implying that the subscription must be the personal act of the testator. But it is obvious that the legislature did not intend to abolish the former practice entirely, for in the 41st section (2 R. S. 64) it is required that every witness who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. (*See Chaffee v. Baptist Miss. Con.* 10 Paige, 91; *Butler v. Benson*, 1 Barb. S. C. R. 527; *Keeney v. Whitmark*, 16 id. 141.)

This necessarily implies that a party may make a will who cannot, or who for some cause omits to subscribe his name; and whose name is thus subscribed by another by his direction.

The second requirement is that such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses. We have seen that putting his mark to his name when written by another by his direction, is a subscribing within the meaning of the statute.

But suppose this subscription by the testator was made by him in private, and not in the presence of witnesses, the statute requires that the fact that the subscription was made by him, must be acknowledged to have been so made to each of the attesting witnesses. This acknowledgment by the testator is an independent requisite, and is not to be confounded with the declaration required by the next subdivision, that the instrument so subscribed is his last will and testament. (*Lewis v. Lewis*, 1 Kern. 220.) The

acknowledgment of the testator that the instrument is his last will and testament, and requesting the witnesses to attest it as such, is not a substitute for the acknowledgment of his subscription. All the statutory requirements must be fully complied with. (*Chaffee v. The Baptist Miss. Conv.* 10 Paige, 85. *Remsen v. Brinkerhoff*, 26 Wend. 331.)

It has been shown that a party, blind or deaf and dumb, if in other respects qualified, can make a valid testamentary disposition of his property. In such case, the request to another to write his name and the acknowledgment of his subscription to each of the witnesses, if not made by oral discourse as it cannot be in the case of the dumb, must be in writing, or by such signs as will be intelligible to the witnesses. (*Whitbeck v. Patterson*, 10 Barb. 610.)

It has been sometimes made a question whether the subscription must be made by the testator in the presence of both the witnesses, or when not made in their presence, must be acknowledged in the presence of both at the same time, or whether it may be acknowledged before one at one time, and another at a different time. Mr. Justice Hand, at special term, in *Butler v. Benson*, (1 Barb. S. C. R. 533,) intimates that the acknowledgment may be made to the witnesses separately, or that he may subscribe and publish in the presence of one, and acknowledge and publish before another. But this point was not before the learned judge in that case, and it is believed that his dictum, though entitled to much respect, cannot be supported. It is quite obvious that the execution of the will by the testator and the attestation by the subscribing witnesses are all concurrent acts, and to be done at the same time. The particular order in which these requirements are fulfilled, is not important. There is necessarily some interval between the different acts, though all in contemplation of law are done at the same time. (*Doe v. Roe*, 2 Barb. S. C. R. 205. *Seguine v. Seguine*, *Id.* 394, 5, per *Edmonds, J.* *Keency v. Whitmarsh*, 16 *id.* 141.) The policy of the law, which is to prevent fraud and deception, would be defeated by executing a will at different times, and by piecemeal.

By the English statute, the testator is required to make his signature at the foot or end of the will, or to acknowledge that he had so made it, in the presence of two or more witnesses, present

at the same time. (*Section 9 of the act of 1 Vict. 26.*) Under this statute it has been held that the act is not complied with unless both witnesses shall attest, and subscribe after the testator's signature shall have been made or acknowledged to them, when both are actually present at the same time. (*Cooper v. Bockett*, 3 *Curties*, 659, *per Sir Henry Frost*. 1 *Wms. Ex'rs*, 75, 4th *Am. from the last Lond. ed.*) This phraseology is slightly different from our statute. It requires, in express terms, that both witnesses must be present *at the same time*. Our statute requires the same thing by necessary implication, unless the testator may be allowed to subscribe twice. As he is to subscribe or acknowledge, in the presence of each of the attesting witnesses, they both must be present at the time he subscribes or acknowledges.

The usual mode of making the acknowledgment is by a declaration to the witnesses that the subscription is his. It has been held that when the testator produces the will, with his signature visibly apparent on the face of it, to the witnesses, and requests them to subscribe it, this is a sufficient acknowledgment of his signature. (*Gage v. Gage*, 3 *Curties*, 451.)

The third requirement is, that the testator, at the time of making such subscription, or at the time of acknowledging the same, must declare the instrument, so subscribed, to be his last will and testament. Publication was never required, at common law, of a will of personal estate; and it seems doubtful, whether any publication, as distinguished from attestation, was necessary for a will of lands, under the statute of frauds. (*Doe v. Purdett*, 4 *Adol. & El.* 14.) Be that as it may, the present English statute requires no other proof of publication, than the execution of the will by the testator, according to the form of the statute. But our statute evidently goes further. The courts have held the parties to a strict compliance with this part of the statute. Thus in *Lewis v. Lewis*, (1 *Kernan*, 220,) the testator presented the instrument to the witnesses and said, "I declare the within to be my free will and deed." This was held not to be a sufficient declaration that the instrument was his last will and testament. (*See also Brinckerhoof v. Remsen*, 8 *Paige*, 488; *S. C. in error*, 26 *Wend.* 325.) This declaration must be made in the presence

of two witnesses. It is not sufficient that he so declares in presence of one witness, and afterwards signs in the presence of two witnesses who subscribe it as witnesses, at his request. (*Seymour v. Van Wyck*, 2 *Seld.* 120.) But when a testator, in the presence of the subscribing witnesses, dictated the provisions of a testamentary paper, read it aloud after it was drawn, signed it, and then requested them to give it their attestation, it was held by the learned surrogate of New York, that the substance of what the statute required, was performed. This, he thought, was a sufficient testamentary declaration. (*Carle v. Underhill*, 3 *Bradf. Sur. R.* 101.)

It has been shown, that the precise order in which the transactions of making a will occur, is not very important. In one case, when the testator made the testamentary declaration, before he actually subscribed the will, but on the same occasion, it was held to be a substantial compliance with the act. (*Rieben v. Hicks*, 3 *Bradf. Sur. R.* 353.) Nor is the form of much importance, provided the ideas be properly expressed. When the testamentary declaration and the request to the subscribing witnesses to attest the instrument, were made by means of questions put by the counsel attending the execution of the will, and the affirmative response of the testator, it was held to be a satisfactory compliance with the statute. (*Tunison v. Tunison*, 4 *Bradf. Sur. R.* 138.)

So when the testator, after subscribing his will, went to a store where were three persons, whom the draftsman, in the presence of the testator, requested to sign an instrument which he said was the testator's last will and testament. He then read the attestation clause, and asked the testator if that was his last will and testament, and the testator said it was. The three persons then signed it as witnesses. The testator did not request the witnesses to subscribe it as such, but it was held by the supreme court in the 7th district, that the reading the attestation clause in the will, in the presence of the testator as well as of the witnesses, followed by the affirmation that it was his last will and testament, was a complete fulfillment of the requirement of the act. (*Whitbeck v. Patterson*, 10 *Barb.* 608.) It is not expressly stated, but it is fairly to be inferred that the attestation clause recited in the usual form, the performance by the testator of all the requirements

of the statute ; and that this was read in the hearing of the testator and the witnesses.

The 4th and last requirement under consideration is that there shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

Formerly wills and codicils of personal property need not have any witnesses of their publication ; custody was a sufficient publication of them. Nor did the law require such a will to have *subscribing* witnesses to give it force and effect. (*Brett v. Brett*, 3 *Add.* 224.) It was merely required by the English ecclesiastical courts, in a will not attested by subscribing witnesses, that an affidavit should be made by two persons to the signature of the testator to the will (*id.*) or other proof that it was the testament of the testator. But if there was an attestation clause at the foot of the testamentary paper, the courts held that the natural inference was that the testator intended to execute it in the presence of witnesses, and therefore, till such execution, it was incomplete. (*Scott v. Rhodes*, 1 *Phill.* 19. *Watts v. The Public Administrator*, 2 *Wend.* 168.) Still the presumption against the paper, as a complete will, was slight, and might be rebutted by slight circumstances. With respect to a will of real estate, we have seen that the former statute, like the English statutes of Henry 8, from which it was principally taken, required that the instrument should be in writing, and signed by the party making it, or by some other person in his presence, and by his express direction ; and be attested and subscribed in the presence of the testator, by three or more credible witnesses. (*R. L. of 1813*, p. 364.)

The revised statutes have put both kinds of wills upon the same footing ; and instead of three witnesses, have required two only, and have pointed out the manner in which they shall attest the will.

As a matter of precaution the statute requires that each witness should write opposite to his name his respective place of residence. This requirement is merely directory, and the omission to do so, does not invalidate the attestation, but only subjects the defaulting witness to a penalty of fifty dollars. (2 *R. S.* 64, § 41.)

A variety of questions have already arisen under this branch of the statute, and it is probable that others will be started hereafter.

It has sometimes been made a question, whether a person too illiterate, or in other respects unable to write his own name, could be a subscribing witness to a will; or in other words, whether a subscribing witness could make his mark to his attesting signature, instead of signing his name, as the statute seems to require. Under the former law it was held in 1809, by the supreme court, that the signing by an attesting witness by his mark was sufficient. (*Jackson v. Van Dusen*, 5 *John*. 144.) The statute under which that decision was made required the will "to be *attested and subscribed* by three or more credible witnesses," &c. The present statute in speaking of the attestation by the witnesses says that each shall *sign* his name as a witness. It had long been held that though the testator was required to *sign* the will, the making of his mark was a sufficient signing. There is a strong implication in the language of the 41st section that the signing mentioned in the 4th subdivision of § 40, may be by making his mark, except in the single case where the subscribing witness is the one who by the direction of the testator signed the name of the testator to the will. In this latter case the 41st section (2 *R. S.* 64) requires that such witness shall *write* his own name as a witness to the will. If he was able to write the testator's name to the will, he was certainly able to write his own, and it was not unreasonable that he should be required to do it. The statute, however, does not render the attestation of the will invalid, if the witness fails to comply with this provision; but merely inflicts upon the witness a penalty for his disobedience of the statutory requirement. In *Campbell v. Logan*, (2 *Bradf. R.* 90, 97,) the surrogate expressed some doubts on this question, but at the same time, held a will to be well attested, when one of the witnesses signed his own name and held and guided the hand of the second witness, while the name of the latter was signed. The surrogate thought that here was a physical participation of the witness in the act of signing his name, which amounted to a compliance with the requirement of the statute. The difference between such a signing, and making a mark to the name already written by another, is not a difference in principle, but in the degree of participation of the witness in the act of signing. If the first mode was valid, as it doubtless was, the second could not be invalid.

The former statute required the signing by the attesting witnesses to be *in the presence of the testator*. This provision is omitted in the revised statutes, and does not seem any longer to be necessary. But Hand, J., in *Butler v. Benson*, (1 Barb. S. C. R. 530,) inclined to think such signing in presence of the testator was still required. The object of the rule was to prevent imposition by changing the paper; and there is still another object, under the present law, to enable the testator to see or know that the witnesses of his own selection, fulfill the duty which he solicited them to perform. But the better opinion seems to be, that the legislature by dropping that requirement, purposely intended to dispense with it, in the execution of wills. (*Riddon v. McDonald*, 1 Bradf. Sur. R. 352. 4 Kent's Com. 515. *Lyon v. Smith*, 11 Barb. 124.) It is, at common law, required of a subscribing witness that he should attest the instrument which he is called to see executed, *at the time it was executed*. The execution by the parties and the subscribing by the witness, are considered as parts of the same transaction. Although the witness was present and saw an instrument executed, if he did not subscribe it at that time, but did afterwards, without the request of the parties, he is not a good attesting witness. (*Hollenbeck v. Fleming*, 6 Hill, 305. *Henry v. Bishop*, 2 Wend. 575. *Lyon v. Smith*, *supra*.) But the common law does not require the witness to subscribe in the actual presence of the parties who have executed the instrument, and as the statute has dispensed with it in the case of wills, by being silent on the subject, it is no longer, in this state, an indispensable requirement. It is, however, still retained, in the 1st Victoria, ch. 26, § 9, notwithstanding the omission of it was recommended by the real property commissioners.

It seems unnecessary to notice the cases under the former law. As nearly thirty years have elapsed since the rule was changed, it is not probable that any event will arise calling for the application of the old cases on this subject. The doctrine of real and constructive presence, which often created doubtful questions, is no longer of any practical consequence.

The statute requires that the subscribing witnesses should become such *at the request of the testator*. Various questions have

arisen under this branch of the statute. In *Rutherford v. Rutherford*, ejectment was brought by the plaintiff as heir, against the defendant, claiming as devisee under the will of the ancestor of the parties. The question was as to the valid execution of the will of the ancestor, for if that was established the plaintiff could not recover as heir. The case turned upon the question whether both the witnesses signed at the request of the testator. With respect to one of them the evidence of such request was positive and unequivocal. With respect to the other, a request was sought to be inferred, from the fact that the testator desired the witness to be sent for to attest the execution of his will, and from a request to such witness by another person, in the testator's presence; it was held by the supreme court, that the question whether the requisite request was made ought to be submitted to the jury; and because the circuit judge inferred such request and nonsuited the plaintiff, the supreme court set aside the nonsuit with a view of submitting the question to the jury, who they admit might draw that inference. The case is an authority to prove that the request of the testator may be inferred from the circumstances of the case, but that the drawing of that inference, when the question arises in an action at law, by a party claiming as heir, in hostility to the will, must be drawn by the jury, and not by the court.

The statute is silent as to the time when the testator must request the witnesses to attest the execution of the will. Whether this request may be *before* he has himself subscribed the will, or not till he publishes it to be his last will and testament, is not specifically declared in the statute. It was very properly held by Edmonds, justice, in *Seguine v. Seguine*, already cited for another purpose, that this request may be made by the testator *previous* to his own subscription, provided it be in the same interview at which the will is signed and published by the testator, and as a part of the *res gestæ*; one act immediately following the other without any interval, and without any interruption to the continuous chain of the transaction. (2 *Barb. S. C. R.* 386.)

The request of the testator to the witnesses cannot always be proved by direct evidence. The witnesses may, perhaps, forget the actual terms which were used, and the statute does not insist

on any particular form of making this request. We have seen that it may be inferred by a jury, in a proper case; and it also, doubtless, may be inferred by the surrogate, on the application for probate. If the attestation clause is drawn in the usual form, it will state that all the requisite formalities were complied with, mentioning them, and among others, that the witnesses subscribed their names as such at the request of the testator. If, after the execution of the will by the testator, this clause, before it is subscribed by the witnesses, be read distinctly aloud in the presence and hearing of the testator and the witnesses, their signature to it affords some evidence that all the requirements of the statute were complied with. In case of their death, the proof of their signatures will be sufficient evidence that the will was executed in due form. The fact that the attestation was so read and understood by the testator at the time, is sufficient presumptive proof not only of publication, but also that the witnesses signed at his request. (*See Brinckerhoof v. Remsen*, 8 Paige, 489, and the cases before cited. *S. C. in error*, 26 Wend. 325. *Hutchins v. Cochrane*, 2 Bradf. Sur. Rep. 295. *Doe v. Roe*, 2 Barb. S. C. Rep. 200. *Rieben v. Hicks*, 3 Bradf. Sur. Rep. 353. *Seguine v. Seguine*, 2 Barb. S. C. R. 385.)

Nor will the fact that either or both of the witnesses, in such a case, have forgotten the fact of such request from the testator, be sufficient to invalidate the will. Their *failure to recollect* the particular occurrences, at the execution of the will, to the existence of which they have certified, is quite a different thing from their remembering that no request or publication was made. The formalities stated in the attestation clause may be disproved by the witnesses themselves, and this will repel the presumption of a valid execution of the instrument. (*Chaffee v. Baptist Miss. Conv.* 10 Paige, 85.) But if not disproved, even if the subscribing witnesses have lost all recollection of the transaction, the court, if satisfied from other evidence that they did in fact witness the will, may admit it to probate. (*Peebles v. Case*, 2 Bradf. Sur. Rep. 226, and preceding cases.)

An attestation clause, showing upon its face that all the forms required by the statute have been complied with is not absolutely necessary to the validity of a will, under our statute. (*Chaffee v.*

Baptist Miss. Conv., supra.) And the late English statute expressly provides "that no form of attestation shall be necessary." The subscribing witnesses are permitted to prove that all the forms were in fact complied with, although the attestation clause is silent on the subject. (*Id.*)

It is, however, a matter of wise and prudent precaution, that a proper attestation clause, showing all the statute formalities, should be signed by the witnesses. In addition to the presumptive evidence it affords in case of the death of the witnesses, or their failure of memory, it shows that the person who prepared the will knew what formalities were required for a valid execution of the will, and tends to raise the presumption that he gave to the testator the necessary information in relation thereto. (*Id.*) The propriety of reading over the whole attestation clause, at the time of the execution of the will, in the hearing of the witnesses and of the testator, will occur to every one, and has already been adverted to. The indispensable necessity of this, as well as reading the whole will, in the case of a blind or illiterate person, has already been stated, and will be referred to again under the head of evidence in testamentary cases.

The most liberal presumptions in favor of the due execution of wills, are sanctioned by courts of justice, when from lapse of time or otherwise it might be impossible to give any positive evidence on the subject. Accordingly, a will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses, who, either mistakingly or corruptly swear that the formalities required by the statute were not complied with, if from other testimony in the case, the court or jury is satisfied that the contrary was the fact. And when any of the witnesses are dead, or in such a situation that their testimony cannot be obtained, proof of their signatures is received, as secondary evidence of the facts to which they had attested, by subscribing the will as witnesses to the execution thereof. (*Jauncey v. Thorne*, 2 Barb. Ch. 41. *Nelson v. McGiffert*, 3 id. 158.)

It has been decided in the English ecclesiastical courts, that it was not necessary for the validity of a testamentary instrument, that the testator should intend to perform, or be aware that he had

performed a testamentary act. It was supposed to be enough that the paper contained a disposition of the property to be made after death, though not intended to be a will, but an instrument of a different shape. (*Bartholomew v. Henley*, 3 *Phill.* 317.) The provisions of the act we have been considering, are calculated to guard against the establishment of a paper as a will which the testator did not mean should have that character. To make a valid will there must, in all cases, be the *animus testandi*; an intention, not only that the instrument should operate, but that it should operate as a will; and this whether the subject relates to real or personal estate.

In concluding this branch of the subject, it seems expedient to notice the effect of a subscribing witness being named as executor in the will, or of his being a legatee or creditor of the testator. The New York code of procedure does not extend to surrogates' courts, and therefore leaves all questions of evidence to be decided by the principles of the common law, so far as they are not altered by the revised statutes. Those statutes provide, that if any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate, shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made. (2 *R. S.* 65, § 50.) The next section saves to the witness so much of the share of the testator's estate as would have descended to him, in case the will was not established, as will not exceed the value of the devise or bequest made to him in the will, and allows him to recover it of the devisees or legatees named in the will, in proportion to and out of the parts devised to them.

If by any will, any real estate be charged with any debt, and the creditor whose debt is so charged shall attest the execution thereof, such creditor, notwithstanding such charge, shall be admit-

ted as a competent witness to prove the execution of such will. (2 R. S. 57, § 6.)

But whether, if a party named as executor, without any legacy or other trust vested in him, should be a subscribing witness to the will, at the request of the testator, that circumstance would render him incompetent as a witness, is not provided for in the statute. A mere executorship does not seem to be a *beneficial appointment*, and therefore his office is not invalidated by his being a subscribing witness. In *Burritt v. Silliman*, (16 Barb. 198,) the executor was not a *subscribing* witness to the will, but was offered as a witness to establish the will after the subscribing witnesses had been examined. The large bulk of the property of the testator was bequeathed to the executors, of whom there were three. The one offered as a witness being objected to, on the ground both of his being executor and a trustee under the will, thereupon he renounced his appointment as executor, and also as trustee under the will. But the objection being continued, he was rejected by the surrogate as incompetent, on the ground that before letters testamentary were granted, he had a right to recall his renunciation. On appeal to the supreme court in the third district, the decree of the surrogate was affirmed. The learned judge who delivered the opinion of the court held that a person named as executor in a will is not, at common law, a competent witness to sustain the will when offered for probate, but a renunciation of the executorship would restore the competency of the executor. But the court thought the renunciation as executor did not remove the interest created by the appointment of the executors as trustees, and on that ground sustained the decision of the surrogate. The intimation that an executor, at common law, was not a competent witness, was not material to be decided in that case, and was clearly an *obiter dictum*. The case went to the court of appeals, (3 Kern. 93,) where the judgment of the supreme court and that of the surrogate were reversed. The court of appeals admitted that a person named as an executor in a will was a competent witness to sustain its probate after he had renounced the executorship. Whether he was competent without such renunciation was not a question in the case, nor passed upon by the appellate court. The reversal was upon another ground, not material to the present discussion. This case cannot be considered

as an authority to support the dictum of the court below, that an executor is an incompetent witness at common law, to support the probate.

The very question we are considering arose at a later day, in the supreme court in the second district. In that case, one of the persons named as executor in the will had been admitted as a witness to prove its execution, by the surrogate of Kings county, against the objection of the contesting parties. From the decree of the surrogate admitting the will to probate, an appeal was taken to the supreme court, and the decision of the surrogate was affirmed. This case conclusively settles the question in favor of the competency of the executor to be a subscribing witness, when he takes no other interest under the will.*

SECTION II.

Of the form and language of a will, and the materials of which it is composed, and of the person by whom it may be written.

There is no particular form of words necessary to make either a will of real or personal estate. With regard to the latter, a great degree of looseness formerly prevailed, but as the revised statutes have placed both upon the same footing, and have now been in force nearly thirty years, it seems inexpedient to notice, more at length, the former practice.

It is said to be essentially requisite that the instrument should be made to depend upon the event of death as necessary to consummate it; for when the paper directs a benefit to be conferred *inter vivos*, without reference, expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary. (*Glynn v. Oglander*, 2 *Hagg.* 428.)

In a will of real estate, the word "heirs" was not necessary to pass an estate in fee. (*Cruise's Dig.* title 38, ch. 11, §§ 3, 4.) The intention of the testator, to be gathered from the whole will, is to govern. (*Jackson v. Babcock*, 12 *John.* 389.) The word "estate" passes a fee. (*Jackson v. Merrill*, 6 *John.* 185. *Same*

* This question was decided by me in the same way, twenty-five years ago, while I was surrogate of Washington county.

v. *Delaney*, 13 *id.* 537.) It is unnecessary to collect the cases on this point, since the revised statutes have adopted the principles on which they were decided, and declared that any devise of real estate, or any interest therein, shall pass all the estate or interest of the testator, unless the intent to pass a less estate should appear by express terms, or be necessarily implied. (1 *R. S.* 748, § 1.) And if the will by any terms, denotes the testator's intent to devise all his real property, it shall be construed to pass all the real estate which the testator was entitled to devise at the time of his death. (2 *R. S.* 67, § 5.) Thus, it places a will of real estate, in this respect, on the footing of a will of personal property, contrary to the former practice, which did not permit a devise to pass any lands but such as the testator possessed at the time the will was made, and of which he continued possessed till the time of his death.

A will is usually written on paper or parchment, and with pen and ink. In the English ecclesiastical courts, wills of personal property written with a pencil have been admitted to probate. (*Rymer v. Clarksdon*, 1 *Phill.* 35. *Green v. Skipworth*, *Id.* 53. *Dickenson v. Dickenson*, 2 *id.* 173.) It is laid down in Williams' Executors, 91, a work of high authority, that this is still law, but he refers to no case since the statute of 1 *Vict. ch.* 26. The question does not seem to have been decided, in our courts, since the revised statutes. Wills of real and personal property are both placed on the same footing, and are required to be in writing and to be subscribed by the testator at the end thereof, and to be attested by at least two witnesses who are to sign their names at the end of the will as such witnesses. There is a strong implication, from the language of the statute, that the will should be written with pen and ink. It is certainly the most prudent to do so. The decision of the court of errors, in *Davis v. Shields*, (26 *Wend.* 341,) which arose under similar language, in the statute of frauds, to that in the act concerning wills, affords a strong argument in favor of the doctrine, that a testamentary instrument must be written on paper or parchment, with pen and ink.

It is immaterial in what language the will is written, whether

in Latin, French or any other language. (*Swinb. pt. 4, ch. 25, pl. 31.*) If written in a foreign language, probate is granted of a translation, as will be more fully seen hereafter.

The question has often arisen in our courts, whether a will written by a legatee, or by his procurement, was a valid instrument. By the civil law such instrument was void. But this rule has not been adopted to its full extent, in England and this country. The subject was examined much at large by Baron Parke, in the judicial committee of the privy council, in 1837, and the result of it was that the *onus probandi* in every case lies upon the party propounding a will for probate; and second, that when the party who prepares a will, takes a benefit under it, it is a circumstance which excites the suspicion of the court, and unless that suspicion be removed, the court will not pronounce in favor of the instrument. (*Barry v. Butlin*, 1 *Curteis*, 637.) If the court becomes satisfied, from the evidence and surrounding circumstances, that the paper contains the will of the deceased, it will pronounce for it, though, as in that case, it was prepared by the deceased's solicitor, under which he took a considerable benefit, the only son of the testator being excluded, and the deceased being of weak, though of testable capacity. (*Id.*)

This question has frequently arisen in our courts, and has been decided the same way. In *Crispell v. Dubois*, (4 *Barb.* 393,) the subject was carefully examined by Harris, justice. The result was that on a feigned issue to try the validity of a will containing a devise in favor of his medical attendant and confidential adviser, and drawn by the devisee himself, more was required than bare proof that the testator was of sound mind, and of the execution of the will according to the formalities required by law. Some affirmative evidence, it was said, must be given, to show that the testator knew the contents of the will, and that it expressed his real intentions. In this class of cases it would be more satisfactory to have direct proof that the testator gave instructions for drawing the will, or that it was read over by or to him; yet such evidence is not indispensable. Proof that the will was the spontaneous intention of the testator, may be made out in any legitimate mode in which his real intention can be ascertained. (*Id.*)

In *Blanchard v. Nestle*, the testatrix wrote a part of the will containing a legacy in her own favor, but it was shown that she only obeyed, with reluctance, the command, or complied with the urgent request of her father, and the will was upheld. (3 *Denio*, 43.) The same doctrine has been repeatedly held by the surrogate of New York. (See *Leaycraft v. Simmons*, 3 *Bradf. Sur.* 35; *Wilson v. Moran*, *id.* 72. See remarks of Chancellor Kent, in *Prince v. Hazleton*, 20 *John.* 509, 516.)

SECTION III.

Of nuncupative wills and codicils.

The subject of nuncupative wills was briefly noticed in chapter first, ante, page 64. A few remarks will be added to what is there said on the subject.

The former statute of this state enacted that no nuncupative will should be good when the estate thereby bequeathed exceeded seventy-five dollars in value, unless the same be proved by the oaths of three witnesses at the least, who were present at the making thereof; nor unless it be proved that the testator at the time of pronouncing it, bid the persons present, or some of them, bear witness that such was his will, or words to that effect, nor unless such nuncupative will be made in the last sickness of the deceased, and in his dwelling house, or where he had been resident for ten days or more next before the making of such will, except when such person was surprised or taken sick being from home, and died before his return to the same. That after six months from the speaking of the testamentary words, no testimony should be received to prove such will, except the said testimony or the substance thereof should have been committed to writing within six days after the making of the said will. The act also provided that letters testamentary should not be issued till after fourteen days from the death of the testator, nor then without a citation to the widow or next of kin. (1 *R. L. of 1813*, p. 307, §§ 14, 15.) It was while those statutory provisions were in force, that the case of *Prince v. Hazleton*, (20 *John.* 502,) arose. The construction put upon the act in that case, limited the time for making a nuncupative will to the period when the testator was *in extremis*, or

overtaken by sudden or violent sickness, and had not time to make a written will. By the words "last sickness," in the purview of the statute, the court held were to be understood the last extremity. That will was set aside, and there can be no question that the fraudulent attempt on that occasion, to get the control of the large estate of a sick man, by means of such a will, pretendedly made, led the legislature, at the revision in 1830, to repeal the former law, and to substitute the provisions of the revised statutes that no nuncupative or unwritten will, bequeathing personal estate, should be valid, unless made by a soldier while in actual military service, or by a mariner while at sea. (2 R. S. 60, § 22.) To that class of persons alone is reserved the right of a testamentary disposition of their personal property under the circumstances mentioned in the act.

The right of disposing of real property is not affected by the statute. Nothing but personal property can be the subject of a nuncupative will.

The present English statute is similar to that of this state and limits the right of testamentary disposition by a nuncupative will "to any soldier being in actual military service, or any mariner or seaman being at sea." (1 Vict. ch. 26, § 9.) Under this provision the English courts have held that the privilege does not extend to a soldier quartered in barracks, either at home or abroad. (*Drummond v. Parish*, 3 Curteis, 522, *White v. Ripton*, 3 id. 818.)

In the recent case of *Hubbard v. Hubbard*, (12 Barb. 148,) a mariner while actually at sea, and during his last illness, and within an hour of his death, in answer to the inquiry what disposition he wished to make of his property? replied, "I want my wife to have all my personal property;" such declaration being made in the presence of four witnesses, and the testator being of sound mind and memory at the time, and under no restraint, it was held by the supreme court in the second district, that this was a good nuncupative will, and their judgment, reversing that of the special term, and affirming that of the surrogate, who had admitted the will to probate, was affirmed by the court of appeals. (5 Seld. 196.) The learned judge of the supreme court, in the course of his opinion, well remarked, that the right of a soldier in actual military service

or of a mariner at sea, to make an unwritten will, is not an unqualified right which may be exercised under all circumstances. As the making of such wills can only be justified upon the plea of necessity, so they will only be tolerated when made in extremis.

In the foregoing case of *Hubbard v. Hubbard*, a mariner was said to be at sea, while on board his vessel, temporarily wind bound during his voyage, in an arm of the sea, where the tide ebbs and flows.

The revised statutes do not prescribe any formalities, or number of witnesses as essential to the validity of a nuncupative will. The 40th section, already treated of, obviously relates only to written wills, and cannot be considered as repealing the previous 22d section which allows of nuncupative wills in the specified cases of soldiers in actual service, and mariners while at sea. The two can stand together, which will leave the mode of proof of this kind of wills to be governed by the common law. It is necessary that the testator should be shown to be of sound mind and memory, and that he intended at the time to make a testamentary disposition of his property. No particular number of witnesses is required at common law, nor any other ceremonies as to publication or attestation. (*See opinion of Marvin, J. in Court of Appeals, (5 Seld. 200 to 202, where the subject is well considered.)*) Whether it is required for the validity of such a will that the testator should be *in extremis* when it was made, was expressly left undecided by the Court of Appeals. The question did not arise in that case.

It was remarked by Sir John Nicholl, in *Lemann v. Bonsall*, (1 Add. 389,) that independent of the statute of frauds, the *factum* of a nuncupative will required to be proved by evidence more strict and stringent than that of a written one in every single particular, in consequence of the facilities with which frauds in setting up such wills are obviously attended.

With respect to codicils, it is only necessary to add, that the term "will," as used in the statute, includes codicils as well as wills. (2 R. S. 68, § 71. *Howland v. Union Th. Sem. 4 Sanf. S. C. R. 82. Seymour v. Van Wyck, 2 Seld. 120.*)

CHAPTER IV.

OF THE REVOCATION OF WILLS.

It is a general principle of law, that a will does not take effect till the death of the testator. Until the happening of that event, therefore, all its provisions are in the breast of the testator, and he may alter them as he pleases. It is not in the nature of things that a will should be irrevocable. It is not a compact to which other persons are parties, but a voluntary disposition of property which the testator wishes to take place when he is dead. A will is, therefore, correctly said to be ambulatory, till the death of the testator. (*Dan v. Brown*, 4 *Coven*, 490.) *Voluntas est ambulatoria usque extremum vite exitum.* (4 *Co.* 61 *b.*)

The act of 1853, concerning wills, (1 *R. L.* 364, § 3,) prescribed the means by which wills should be revoked or altered, which with slight modifications, have been adopted by the revised statutes. The existing statutes contemplate four methods of revoking a will, all of which relate, as well to a will of real as of personal property. 1st. By a subsequent will in writing. 2. By some other writing of the testator declaring such revocation, and executed with the same formalities with which the will itself was required to be executed. 3. By burning, tearing, obliterating, canceling or destroying it with intent to revoke it. 4. By certain changes in the testator's situation in life, as by marriage. To which may be added, 5. Partial revocations occasioned by ademption of a legacy. It is proposed to treat of each of them in their order.

SECTION I.

Of revocation by a subsequent will.

The operation which a subsequent will, containing no express words of revocation, has upon a prior will, is an interesting question; and often a difficult one to be determined. Whether the two shall stand together, as constituting one will, or the last be deemed a revocation of the first, depends upon a variety of circumstances, indicating intention, some of which will now be considered.

It is laid down by Swinburne, (*Pl.* 7, § 14, *pl.* 11,) and repeated by most of the elementary books on this subject, that a man may make a testament as often as he pleases, until his last breath; but no man can die with two testaments, and therefore the last and newest is of force; so that if there were a thousand testaments, the last of all is the best. But this must be understood with this qualification, that a subsequent will does not work a total revocation of a prior one, unless the latter expressly revoke the former, or the two be incapable of standing together; for though no man can "die with two testaments," yet any number of instruments, whatever be their relative dates, if duly executed, may be admitted to probate, as together containing the last will of the deceased. (*Masterman v. Waverly*, 2 *Hagg.* 235. *Van Wert v. Benedict*, 1 *Bradf.* 114. *McLoskey v. Reid*, 4 *id.* 334.) And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to the points only where they are inconsistent. So a codicil, not expressly revoking a former will of real estate, though it professes an intention to make a disposition of the whole estate different from the will, if it do not do so in fact, but only in part, is not a revocation *pro tanto*. (*Brant v. Wilson*, 8 *Cowen*, 56.) And in the latter case, the supreme court recognize the rule to be, that the contents of the second will must appear to be inconsistent with the dispositions of the former will to operate as a revocation, and that if part is inconsistent, the first will shall only be revoked to the extent of the discordant dispositions. When the subsequent paper is merely codicillary, there is no difficulty; but when the subsequent will is not in conflict, but makes a full disposition of the estate, whether wholly or partially incompatible with a former will, it is a revocation of such prior will *in toto*, unless it appears from the instrument itself that it was the intention of the testator that they should stand together. The principle on which two instruments together are admitted to probate, as containing the will of the testator, is the *intention* of the testator that they should so operate; and the ecclesiastical courts admitted parol evidence of the *animus* with which the act was done. (*Greenough v. Martin*, 2 *Add.* 239. *Mithuen v. Mithuen*, 2 *Phill.* 416. *Bartholomew v. Henley*, 3 *id.* 319.)

But it has been held by the court of appeals of New York, that upon a question of revocation of a will, no declarations of the testator are competent evidence except those which accompany the alleged act of revocation. (*Waterman v. Whitney*, 1 Kern. 157, *per Selden J.*)

The general principle, no doubt is, that bequests are *prima facie*, to be taken *cumulatively*, when they are on separate papers unless they are revocatory of each other. (*Bartholomew v. Henley*, 3 Phill. 313.)

In *Langdon v. Astor's Ex'rs*, (2 Smith, 9. 16 N. Y. Reps.) it was held by the New York court of appeals, that a testator in his will, cannot reserve a right to qualify, by an unattested writing, a transaction which at the time of such writing, shall have already passed and taken effect, or which was the act of another person, so as by means thereof to affect legacies or other provisions in his testamentary papers. He cannot alter his will otherwise than by an instrument attested in the same manner as required to give it effect as a will. He may, however, make his testamentary gifts dependent upon the happening of any event in the future, whether in his lifetime or afterwards. He may, therefore, provide, that a legacy shall not be payable, if in his lifetime, he shall give to the legatee an amount equal to the legacy; and he may add to the condition the further requirement, that any advancement he may make, shall, in order to be applied on account of the legacies, be charged to the legatee on his books of account.

It was long a vexed question, whether on the revocation of a later will, a former uncanceled will should revive or not. (*Goodright v. Glazier*, 4 Burr. 2512. *Harwood v. Goodright*, Cow. 87, 92. *Moore v. Moore*, 1 Phill. 406. *Onions v. Tyler*, 1 P. Wms. 345.) In the common law courts the presumption was said to be in favor of the revival of the former will, but in the ecclesiastical courts, either an opposite presumption prevailed, or the case was considered open without prejudice to the examination of testimony. In both courts, parol evidence was admissible to ascertain the intention of the testator. The New York revisers proposed to change this rule by adopting the presumption against a revival, and excluding evidence to contradict it. (3 R. S. 633,

Revisers' Notes.) This was sought to be done by the 53d section, (2 R. S. 66,) which enacts, that if, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or, unless after such destruction, canceling or revocation he shall duly republish his first will. Under this statute it has already been shown that no declarations of the testator are competent evidence on the question of revocation, except those which accompanied the act, and were a part of the *res gestæ*. (*Waterman v. Whitney, supra.*)

The 22d section of the English statute (1 Vict. ch. 26,) contains a similar provision to that of the 53d section of the New York revised statutes. Under the English statute it has been held that if a second or third will contain a clause, revoking all former wills, the destruction of the latter will does not revive the former, and that parol evidence is inadmissible to show an intention to revive. (*Major v. Williams*, 3 Curteis, 432.) It is presumed the same principle is applicable to cases arising under the New York statute, although I am not aware that the question has arisen and been decided.

SECTION II.

Of revocation by express terms in a subsequent will, or other instrument.

As to an express revocation contained in a will or codicil, or some other writing of the testator, it is provided by the revised statutes, (2 R. S. 64, § 42,) that such will, codicil or *other writing declaring such revocation or alteration* must be executed by the testator with the same formalities that are required by law for the execution of a will. This provision was borrowed from the sixth section of the English statute of frauds, and departed from it only, in extending to a will of personal property, as well as to one of real property, to the latter of which the English statute was confined. The 20th section of the late English statute of wills, (1 Vict. ch. 26,) contains a similar provision to that of the New York statute.

The English statute of frauds (29 *Charles 2*, *ch. 3*, § 6,) enacted that no devise in writing of lands &c. shall be revocable, otherwise than by some other will or codicil in writing, *or other writing* declaring the same, signed by the testator in the presence of three or more witnesses, declaring the same. The law of this state concerning wills, passed in 1813, § 3, (1 *R. L.* 365,) forbid a will to be revoked or altered otherwise than by some other will or codicil in writing, *or other writing of the party* to such last will and testament, declaring the same, and signed, attested and subscribed in manner aforesaid, that is as wills are required to be signed and attested. The 20th section of the statute of Victoria, *ch. 26*, requires that the *other writing declaring the intention to revoke the will*, shall be executed in the same manner as wills were therein required to be executed.

The meaning seems to be that a testator may revoke his will by a subsequent will, in which he makes a different disposition of his property and expressly declares such revocation. Or, if he prefers to die intestate, and to place the matter beyond all doubt, chooses to revoke all former wills or codicils by him made, he may do so by executing an instrument in writing, declaring such revocation or intention, and executing it with the same formalities that are required by law for the execution of a will. (2 *R. S.* 64, § 42.) There is no absurdity in requiring such instrument to be executed as a will, for it is a testamentary writing, or in calling that a will which declares an intention to die intestate. The implication from the 42d section is that a subsequent will is no revocation of a former one, unless it contains matter therein which indicates such intention. If the contents of the last will cannot be ascertained, it is no revocation of the former will. (*Nelson v. McGiffert*, 3 *Barb. Ch. R.* 158.)

As the republication of a will is equivalent to the making of a new will, such republication will revoke any will intermediate to the original date of the prior will and of its republication. (*Rogers v. Pittis*, 1 *Add.* 30.) This subject will be noticed more at large in a subsequent section. (*See post.*)

SECTION III.

Of revocation by cancellation, burning, tearing, obliterating or destroying it.

It was remarked by Sir John Nicholl, in *Smith v. Cunningham*, (1 *Add.* 455,) that all questions of revocation, are questions of intention to a certain degree; for every fact of revocation is in some respects *equivocal*. Canceling and obliterating are justly considered peculiarly as equivocal acts, which in order to operate as a revocation, must be done with an intention to revoke.

In *Jackson v. Halloway*, (7 *John.* 394,) the testator had made alterations in his will, not with intent to destroy the devise already made, but to enlarge it by extending it to lands subsequently acquired. The alterations and amendments were not attested according to law, and therefore failed to operate. But it was held that they did not destroy the previous devise, for that was not the testator's intention. The mere act, say the court, of canceling, is nothing, unless it be done *animo revocandi*. (See also *Jackson v. Potter*, 9 *John.* 312.)

Unless the testator possesses a testamentary capacity, he can no more revoke a will by tearing or cancellation, than he could revoke it by a new will, or other instrument of revocation. There must be the *animus revocandi* in both cases, and this involves the idea of a sound disposing mind and memory. A madman cannot have this intent. (*Smith v. Wait*, 4 *Barb.* 28. *Nelson v. McGiffert*, 3 *Barb. Ch.* 158.) So a will partially defaced by a testator, whilst of unsound mind, was pronounced for, as it existed in its integral state, that being ascertainable. (*Scruby v. Fordham*, 1 *Add.* 74.)

The presumption of law, *prima facie* is, that obliterations &c. made after the execution of the will, are done, *animo revocandi*. (*Thyne v. Stanhope*, 1 *Add.* 52. *Rickards v. Mumford*, 2 *Phill.* 23, 28.) But this presumption may be repelled by evidence showing that the animus did not exist—as if a man was to throw ink on his will instead of sand, though it might be a complete defacing of the instrument, it would be no revocation; or suppose a man having two wills of different dates by him, should direct the

former to be canceled, and through mistake, the person directed should cancel the latter, such an act would be no revocation of the latter will. A cancellation therefore, through accident or mistake, will be ineffectual to revoke a will. (*Thyne v. Stanhope, supra. Onions v. Tyrer*, 1 P. Wms. 344. 2 *Vernon*, 743. *Perrott v. Perrott*, 14 *East*, 423, 439.)

Nor does it make any difference whether the mistake be in a matter of fact or of law. Lord Ellenborough thought, in *Perrott v. Perrott, supra*, that a mistake in point of law, clearly evidenced by what occurred at the time of canceling, would have the same operation as a mistake in matters of fact.

The revised statutes of New York, (2 R. S. 64, § 42,) must be construed with reference to the decisions of the courts. To render a burning, tearing, canceling, obliterating or destroying of a will, a revocation, it is necessary that the act should have been done *with the intent and for the purpose of revoking the same*, by the testator himself, or by another person in his presence by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, are required to be proved by at least two witnesses.

In a case in the prerogative court, (*In the goods of Appleby*, 1 *Hagg.* 66,) an executor having in pencil altered a will by the direction of the testator, who approved it when so altered, and then canceled it, only in order that another might be drawn up, the preparation of which was prevented by the death of the testator, Sir John Nicholl held that such cancellation, being preparatory to the making of a new will by the deceased, and conditional only, was not a revocation, and he granted probate of the canceled will in its original state.

If a testator tear off his seal and signature at the end of the will, the court will infer an intention to revoke the whole will, this being the ordinary mode of performing that operation. (*Per Sir John Nicholl in Scruby v. Fordham*, 1 *Add.* 78.) If, on the other hand, he obliterates only a particular clause, on the same principle it operates as a revocation only *pro tanto*. (*Id.*)

If the intention to revoke the will is apparent, the act of cancellation or obliteration shall carry such intention into effect, although not literally an effectual destruction or obliteration of the will, pro-

vided the testator *completed* all he intended to do. But if the act of destruction or cancellation be inchoate and incomplete, it will not amount to either a partial or total revocation. Thus, if the testator in a fit of rage conceive the intention of destroying his will and commence to do so by tearing it, and afterwards desists and puts the pieces together, his anger being appeased, it becomes a question for the jury on the evidence, whether the testator did all he intended, or whether he was prevented from completing the act of destruction he intended. And if they find he was so prevented, the act of destruction being incomplete, would not operate as a revocation of the will. (*Doe v. Perkes*, 5 B. & A. 489.)

A lost or destroyed will cannot be proved in the surrogate's court. Jurisdiction in such a case formerly belonged to the court of chancery, and since the abolition of that court, to the supreme court. (*Bulkley v. Redmond*, 2 Bradf. S. R. 281.) Provision for this purpose is made by the revised statutes. (2 R. S. 67, as altered in 1830. 3 R. S. 153, 5th ed.) The statute applies to wills of real or personal estate, and to wills lost or destroyed, either by accident or design. By the 67th section it is enacted that no will of any testator who shall die after the 1st January, 1830, shall be allowed to be proved as a lost or destroyed will, unless the same shall be proved to have been in existence at the time of the death of the testator; or be shown to have been fraudulently destroyed in the lifetime of the testator; nor unless its provisions shall be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness.

A similar jurisdiction, in regard to wills of personalty, lost or fraudulently destroyed, was exercised in England by the ecclesiastical courts, whose practice in this respect is substantially copied by the N. Y. statute above cited, and made applicable to both wills of real and personal property. (*Trevelyan v. Trevelyan*, 1 Phill. 149. *Scruby v. Fordham*, 1 Add. 78. *Foster v. Foster*, *Id.* 462.) On the establishment of such will by the supreme court, it is to be recorded by the proper surrogate, and letters testamentary or of administration, with the will annexed, are to be issued by him in the same manner as on wills duly proved before him. (3 R. S.

153, 5th ed. *supra*.) It is presumed that before the revised statutes, the establishment of a lost will of *personal* estate belonged to the surrogate's court, or the court of probate, as the case might be, as possessing the jurisdiction in this state which the ecclesiastical courts exercised in England.

If a testator is shown once to have executed his will, with the ceremonies required by the statute, and on his death the instrument is not found amongst his papers, it has been a controverted question, whether its destruction by the testator or its continued existence is to be presumed. In *Jackson v. Betts*, (9 Cowen, 208,) the supreme court held that in such a case its continued existence, till the death of the testator, would be presumed, unless there be evidence of its having even been canceled, or otherwise revoked by the testator. But this case was subsequently unanimously reversed by the court of errors, after an elaborate review of the English cases, and the doctrine was established that in such a case the legal presumption is that the testator had destroyed it *animo revocandi*. (*Betts v. Jackson*, 6 Wend. 173.) This last decision is undoubtedly the law at this time, both here and in England. (*Bulkley v. Redmond*, 2 Bradf. S. R. 281. *Rickards v. Mumford*, 2 Phill. 23, per Sir John Nicholl. *James v. Cohen*, 3 Curties, 770.)

The same doctrine applies to the case of a mutilation or defacing a will, which upon the death of the testator is found amongst his repositories. Such acts are presumed to have been done by the testator himself, and to have been done *animo revocandi*, especially if the mutilation be such as is usually resorted to for that purpose. (*Lambell v. Lambell*, 3 Hagg. 568.)

But this presumption is one of fact and may be repelled by other circumstances, as by showing that the testator had no opportunity of doing the act, or that it was done by another. (*Minkler v. Minkler*, 14 Vt. R. 125. *Lillie v. Lillie*, 3 Hagg. 184, per Sir John Nicholl.)

SECTION IV.

Of revocations effected by a change in the testator's condition, such as marriage and the like, and of implied and partial revocations.

It is well remarked by Chancellor Kent, (4 *Com.* 521, *Lecture* 68,) that there is not perhaps any code of civilized jurisprudence in which the doctrine of implied revocations does not exist and apply, when the occurrence of new social relations and moral duties raises a necessary presumption of a change of intention in the testator. The rule was borrowed from the civil law, in which it was carried farther than it ever has been in modern times. The presumption that a man has changed his testamentary disposition of his property, does not arise by lapse of time, nor by the accumulation of wealth, nor by the prejudice it may occasion to parties to whom it would go in the case of an intestacy. (*Swinb. pt.* 7, § 15, *pl.* 2.) The late English statute, (1 *Vict. ch.* 26, § 10,) has enacted that "no will shall be *revoked* by any presumption of an intention on the ground of an alteration of circumstances." This was perhaps no more than a declaration of the existing law.

It is proposed to notice a few instances of implied revocations, and to bring to the notice of the reader the statutory provisions on the subject.

The marriage of the testator and birth of a child, when both events occur subsequent to the making of his will, have been held both in England and this country, to amount to a revocation of a will, whether of real or personal estate. (*Brush v. Wilkin*, 4 *John. Ch.* 506. *Havens v. Van Denburgh*, 1 *Denio*, 27.) Both these circumstances must concur to produce this result. Neither marriage alone of a man, or the birth of a child, alone, has such effect. But the marriage of a single woman operated as a revocation of her will. This depended on a different principle, the effect of the matrimonial relation being to take it out of her power to make a will, and thus the nature of the instrument would be destroyed by its ceasing to be ambulatory. Be this as it may, the New York revised statutes have expressly enacted that a will ex-

cented by an unmarried woman shall be deemed to be revoked by her subsequent marriage. (2 R. S. 64, § 44.)

The reason why the marriage and birth of a child shall operate to revoke the will of an unmarried man, was sometimes put upon the supposed change of intention. (*Gibbens v. Cross*, 2 Add. 455.) When it rested upon this foundation, the presumed intention might be repelled by evidence showing unequivocally that the testament is to operate, notwithstanding such marriage and issue. (*Id.*)

At other times the revocation was put upon the *tacit condition* annexed to the instrument by the testator, at the time it was executed, that it should become void on such a total change of his circumstances as would be occasioned by marriage and issue. (*Mars-ton v. Roe*, 8 Ad. & Ellis, 14.) Under that view of the case, the revocation would not be prevented by any thing short of a provision in the will for both the wife and the issue. A provision for either one alone, would not be enough for that purpose. (*Id.*)

The revised statutes have provided for most of the cases which can arise under this head. Thus, it is enacted that if after the making of any will, disposing of the *whole estate* of the testator, such testator shall marry and have issue of such marriage, born either in his lifetime or after his death, and the wife of the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; *and no other evidence to rebut the presumption of such revocation shall be received.* By prescribing the evidence which shall alone be sufficient to rebut the presumption of a revocation and excluding all other evidence on that point, the statute has relieved the courts from the effects of numerous conflicting decisions, and given certainty to the law.

A will made by a sane person does not become void by his subsequent derangement. This springs from the distinction taken by Lord Coke, (*in Andrew Ognel's case*, 4 Co. 50 b,) between a disability created by the act of God, and by the act of the party. If the subsequent disability arises from the act of God, as by insan-

ity, it does not invalidate the will. But if it flows from the act of the party, as by marriage &c., it works a revocation.

But though the birth of a child alone will not revoke a will, yet there is a strong equity in favor of after-born children, for whom no provision is made in the will of the testator, or by any marriage settlement. The revised statutes (2 *R. S.* 65, § 49) have thus provided for that case. If such child so after-born, be unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate, as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will. The effect of this provision upon the rights of the post testamentary child is the same, in effect, as if the testator had died intestate. But the disposition of the matter by the legislature, was intended not to disturb the arrangements which the testator had made of his estate, among the several objects of his bounty, and hence each must contribute ratably out of that which he would be entitled to according to the will, for the purpose of making up the distributive share of the post testamentary child. (*Mitchell v. Blain*, 5 *Paige*, 588.)

It remains to consider, under this subdivision of our subject, some *partial* revocations, which have not hitherto been discussed. It will be more convenient to treat of the nature of *ademption*s when we come hereafter to consider the doctrine with respect to legacies. (*Post*, Part 3, *ch.* 3, § 1.)

It is proper to remember that a will both of real and personal property, speaks of the testator's affairs as they exist at the time of his death, if there be nothing in the will to give it a different effect. Hence the will cannot operate upon any property of which the testator has no interest when the will takes effect. This principle applies both to personal legacies and to devises. Thus, when the owner of a slave, by his will, declared that she should be manumitted and have her freedom immediately after his decease; and afterwards sold her as a slave, and died; it was held that the sale

of the slave by the testator was *pro tanto* a revocation of the will so that she was not entitled to her freedom after his decease. (*In the matter of Nan Mickel, a negro girl*. 14 John. 324.) This was upon the ground that such would be the operation of the act of disposing of any other property owned by him. A will being ambulatory till the death of the testator, and inoperative till his death, does not prevent the testator, in his lifetime, from disposing of his property as he pleases.

Previous to the revised statutes a devise of real estate, whether general or specific, was in the nature of an appointment of the specific estate which the testator had at the time of making his will; but to take effect only on his death, leaving him in the mean time the absolute owner of the same. The deviser must not only be the owner of the estate at the date of his will, but continue such owner till his death. (*Cruise's Dig. tit. Devise, ch. 1, § 10. Adams v. Winne, 7 Paige, 101.*) The devise of land was governed by the analogy of a specific legacy of personal estate. In both cases, the alienation of the property by the testator in his lifetime, operated as a revocation *pro tanto* of his will. To this extent the rule is the same, at the present time, and is not changed by the revised statutes.

But a doctrine had grown up which carried out the principle of implied revocation much further. Thus, a valid agreement or covenant to convey lands, which equity would enforce specifically, upon the principle that what was agreed to be done should be considered as done, operated in equity as a revocation of the previous devise of the same land. (*Walton v. Walton, 7 John. Ch. 258.*) So also any alteration of the estate or interest of the testator in the lands devised, by the act of the testator, was held to be an implied revocation of the will, on the ground principally, of its being evidence of an alteration of the testator's mind. (*Cotter v. Loyer, 2 P. Wms. 624.*) The law required that the same interest that the testator had when he made the will should continue to be the same interest, and remain unaltered till his death. (*4 Kent's Com. 529.*) The least alteration was a revocation. The sale of the real estate, and taking back a bond and mortgage on the same land, was also a revocation. (*Adams v. Winne, supra. Barstow v. Goodwin, 2 Brad. Sur. Rep. 413.*) But a mortgage

or charge upon the estate was made an exception to the general rule, and was only a revocation, in equity, *pro tanto*, or *quoad* the special purpose. (*Sparrow v. Hardcastle*, 3 *Atkins*, 799; *S. C. 7 T. R.* 416, *note*.)

The revised statutes have changed the rule with respect to the above cases in part, by enacting that the testator's agreement to convey any property devised or bequeathed in his will, should not be deemed a revocation, either at law or in equity, but the property should pass by the devise or bequest subject to the same remedies on the bond, agreement or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had against the heirs of the testator or his next of kin, if the same had descended to them. (2 *R. S.* 64, § 45.)

They also provide that a charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate previously executed, but the devises and legacies shall take effect subject to the incumbrances. (*Id.* § 46. *Langdon v. Astor's Ex'rs*, 2 *Smith*, 9.)

The foregoing provisions do not affect cases where the estate or interest of the testator in property previously devised or bequeathed by him are *altered*, but not wholly divested by a conveyance, settlement, deed or other act of the testator. This before the revised statutes, we have seen worked a revocation of the whole will. But now by the revised statutes, such alteration is declared not to be a revocation of the devise or bequest of such property; but such devise or bequest passes to the devisee or legatee the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest. (*Id.* § 47.) But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen. (*Id.* § 48.)

But the statute does not change the law with respect to a case

where the testator has sold and conveyed the real estate devised, and taken back a bond and mortgage for the whole, or a part of the consideration money. The effect of such sale is still to revoke the will as to the real estate so sold and conveyed. (*Adams v. Winne, supra. Barstow v. Goodwin, supra. Brown v. Brown, 16 Barb. 569. Beck v. McGillis, 9 id. 35.*)

It would seem, however, that if after such sale, the testator, in his lifetime, takes back the property by a reconveyance, and is seised of it at his death, that the devise will be effectual. (*Brown v. Brown, supra. See also, Rose v. Rose, 7 Barb. 174; Arthur v. Arthur, 10 id. 9; Havens v. Havens, 1 Sand. Ch. 326; Walton v. Walton, 7 John. Ch. 258, contra.*) *But this latter case arose before the revised statutes enabled a will to pass after-acquired land.*

SECTION V.

Of the republication of wills, and the effect thereof.

Having treated briefly of the various modes by which a will may be wholly or partially revoked, it will be convenient now to consider the way in which a will may be republished, and of the effect of such republication.

Republication is of two kinds, express and constructive. *Express* republication occurs where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of republishing the will. (1 *Jarman on Wills*, 202, *Perkins' ed.*) *Constructive republication* takes place when a testator, for some other purpose, makes a codicil to his will; in which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will. (*Id. Van Cortland v. Kip, 1 Hill, 590.*) The revised statutes (2 *R. S.* 66, § 53,) have reference to the republication of a will which has once been revoked by a subsequent will, and the object of the section was to prevent the destruction, canceling or revocation of such second will from having the effect, *per se*, of reviving the first will, unless it should appear by the instrument by which the revocation was effected, that it was the intention to revive and give effect to

the first will ; or unless after such destruction, canceling or revocation of the second will, the testator should republish his first will.

But there are cases, where the first will has never been revoked by any subsequent will or otherwise, in which it may be desired by the testator to republish his will, so that it may speak from the time of such republication. It is not believed that the statute prevents such republication ; on the contrary, it is supposed that it may be done, either by express republication, in which the ceremonies prescribed for the first execution must be complied with, or by a codicil, executed and attested in the manner required for the execution and attestation of a will.

It is scarcely necessary to add that a will once revoked, cannot be republished by parol. (*Witter v. Mott*, 2 Conn. 67.) Nor can a will once executed according to law, but not revoked, be republished by parol, in any other way than by repeating the ceremonies by which it was first made.

But a codicil duly executed amounts to a republication of the will to which it refers, whether it be annexed to the will or not, or be or be not expressly confirmatory of it, for every codicil is, in construction of law, part of a man's will, whether it be so described in such codicil or not ; and as such, furnishes conclusive evidence of the testator's considering his will as then existing. (1 Wms. Ex. 175. *Moors v. White*, 6 John. Ch. 375. *Van Cortland v. Kip*, 1 Hill, 590.)

A will executed by a party under undue influence, may be republished and confirmed by a codicil executed afterwards, and when the testator is free from such influence. (*O'Neal v. Farr*, 1 Rice's S. C. Rep. 80.) So a will containing a devise of real estate but not duly witnessed, is good if confirmed by a subsequent codicil having the proper attestation, though the latter document be in no way annexed to the will or prior codicil, and though the attesting witnesses to the latter codicil did not see the former one or the will. (*Utterton v. Robins*, 1 Adol. & Ellis, 423. *Havens v. Foster*, 14 Pick. 543. *Miles v. Boyden*, 3 id. 216. *Barnes v. Crowe*, 1 Ves. jun. 486, 498.)

But although the general rule be as above stated, yet if it appears on the face of the codicil that it was not the intention of the testator to republish, the ordinary presumption derived from the

existence of the codicil will be counteracted. (*Langdon v. Astor's Executors*, 2 *Smith*, 9. *Strathmore v. Bowes*, 7 *D. & E.* 483.)

CHAPTER V.

OF THE APPOINTMENT OF EXECUTORS; THEIR ACCEPTANCE, REFUSAL, AND RENUNCIATION OF THE OFFICE.

SECTION I.

Who are eligible, and who not.

An executor is defined, by the elementary writers, to be the person to whom the execution of a last will and testament of personal estate is confided by the testator's appointment. (*Toller's Law of Ex'rs*, 30. 2 *Bl. Com.* 503. 1 *Wms. Executors*, 185. *Wentworth's Ex'rs*, 3.) It is not essential to the validity of a nomination of an executor, that the will should contain a testamentary disposition of property. It is a good will, and entitled to be proved as such, which merely contains the appointment of an executor. It was formerly supposed that if there was no will, there was no executor; and if there was no executor, there was no will. (*Wentw. Ex'rs*, 4.) The former proposition is still true, but the latter is not. There may be a valid will, as will be shown hereafter, which contains no nomination of an executor. (*Hubbard v. Hubbard*, 4 *Selden*, 202.)

With respect to the persons who may be appointed executor, it may, perhaps, be said that all persons are competent to serve, who do not fall within one or the other of the exceptions in the revised statutes, (2 *R. S.* 69, *as amended in 1830*, vol. 3, p. 154, 5th ed.) These statutes enact that no person shall be deemed competent for this purpose, who, at the time the will is proved, is 1. Incapable in law, of making a contract, (except married women;) 2. Under the age of twenty-one years; (3.) An alien not being an inhabitant of this state; (4.) Who shall have been convicted of an infamous crime; (5.) Who upon proof shall be judged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding. A married woman

may be appointed executor, with the consent, in writing, of her husband, which consent must be filed in the surrogate's office, and the husband thereby becomes liable for her acts. If a feme sole takes out letters testamentary as an executrix, and afterwards marries, it is not necessary for the husband to file a written consent with the surrogate, to render him liable for her acts as such executrix. In such a case the husband is liable jointly with her for her acts, done in a representative capacity, after as well as before the marriage. This case is not within the statute, but depends on the principles of the common law. (*Bunce v. Vander Grift*, 8 *Paige*, 37.) The statute is probably broad enough in its terms of exclusion to embrace all whom it would be desirable to debar of the office; and if so, all other persons are of course eligible.

Some of these disabilities are permanent, and others of a temporary nature or subject only to some qualification. Thus, a person who is a non-resident of the state, though in other respects competent, is not entitled to letters testamentary until he shall have given the bond required of administrators in cases of intestacy. (*Id.* § 7.) So also, in case of the personal disability arising from infancy, alienage and coverture, if such disability be removed before the execution of the will is completed, such person shall be entitled, on application, to supplementary letters testamentary, to be issued in the same manner as the original letters, and shall thereupon be authorized to join in the execution of such will, with the persons previously appointed. (*Id.* § 5.)

Previous to the revised statutes, the surrogate was obliged to grant letters testamentary to the executor named by the testator, although he was known to be insolvent. (*The King v. Sir Richard Raines, Carthew*, 457.) But when the executor became insolvent after the making of the will, although the creditors and legatees of the testator could obtain no relief in the ecclesiastical court, the court of chancery sometimes interposed to protect the estate from waste or loss by such insolvency. (*Utterson v. Mairs*, 4 *Bro. C. C.* 270. 2 *Ves. jun. S. C.* 95.) But poverty alone, if known to the testator, was not of itself sufficient to authorize the court of chancery to take the administration out of the hands

of the executor selected by him. (*Howard v. Papera*, 1 *Madd. R.* 86. *Wood v. Wood*, 4 *Paige*, 302, 303, *per Walworth, Ch.*)

The revised statutes, as was well remarked by the chancellor in *Wood v. Wood*, *supra*, have introduced a new principle into our testamentary law. A person interested in the estate of the testator, either as creditor, legatee or relative or otherwise, may now object against the granting letters testamentary, to one or more of the persons named in the will as executors, on the ground that his circumstances are such, as not to afford adequate security to the creditors, legatees and relatives of the deceased for the due administration of the estate. And if the surrogate is satisfied of the validity of the objections he may require security as in cases of intestacy. (2 *R. S.* 70, § 6.)

The foregoing relates to the action of the court *before* the granting of letters testamentary. But it is obvious, that cases may happen, in which, after letters testamentary are granted, the person appointed executor may become incompetent to serve, or his circumstances may be so precarious as not to afford adequate security for his due administration of the estate, or that he has removed or is about to remove from the state. In such a case the surrogate, on the application of an interested party, can require security from the executor like that required of administrators, and in default thereof, he can supersede the letters testamentary. (2 *R. S.* 72, §§ 18, 19, 20, 21. *Cotterell v. Brock*, 1 *Bradf.* 148. *Mandeville v. Mandeville*, 8 *Paige*, 475. *Shook v. Shook*, 19 *Barb.* 653. *Henry v. Bowers*, *Id.* 658. *Holmes v. Cook*, 2 *Barb. Ch. R.* 426.)

It has been held by the court of appeals, under the foregoing provisions, that the surrogate cannot supersede the letters testamentary on the ground that the executor is legally incompetent "by reason of improvidence," on proof merely that he is illiterate, and a person of small pecuniary means, and that he has been guilty of misconduct or mismanagement in administering the trust estate. (*Emerson v. Bowers*, 4 *Kernan*, 449. *Coope v. Lowerre*, 1 *Barb. Ch. R.* 45.)

In *McMahon v. Harrison*, (2 *Seld.* 443,) the court of appeals held that the fact that a man is a professional gambler, is presumptive evidence of such *improvidence* as to render him incompetent

to discharge the duties of executor or administrator. They thus affirmed the decision of the supreme court, reversing that of the surrogate. (*S. C. 10 Barb. 659, reversing same case, 1 Bradf. 283.*)

It is settled, however, under these legislative provisions, that when there is no ground for supposing that the trust funds in the hands of the executor are in danger from his improvidence, or his want of pecuniary responsibility, he cannot be required to give security. (*Mandeville v. Mandeville, supra. 1 Bradf. 283.*)

Under the corresponding provisions of the revised statutes, in relation to the granting of letters of administration, (*2 R. S. 75, § 32,*) it has been held that the improvidence contemplated by the statute, as a ground of exclusion, is that want of care or foresight in the management of property, which would be likely to render the estate and effects of the deceased unsafe and liable to be lost or diminished in value, by improvidence, in case administration should be granted to the improvident person. (*Coope v. Lowerre, 1 Barb. Ch. 45.*)

By the English law, few or none are disabled on account of their crimes, from being executors. But by the civil and canon law, not only traitors and felons, but heretics, apostates, usurers, famous libelers, incestuous, bastards, persons excommunicated, &c., are incapable of being executors. (*Bacon's Abr. tit. Ex'rs and Adm'rs, A 3.*) The revised statutes have adopted a judicious rule by excluding from this office all persons *convicted* of an infamous crime, that is, an offense the conviction for which subjects the accused to punishment in the state prison. The conviction here alluded to, means a conviction upon an indictment or other criminal proceeding. (*Coope v. Lowerre, supra.*) No degree of legal or moral guilt or delinquency is sufficient for this purpose, unless such person has been actually convicted of an infamous crime, in the ordinary mode of judicial procedure. (*Id.*)

It would seem, from what was said in *Emerson v. Bowers*, (*4 Kern. 449,*) that the fact that the party named as executor in a will was illiterate, if in other respects competent, affords no ground for the surrogate to withhold the granting of letters testamentary to him, nor for superseding the same afterwards.

Our next inquiry under this head is, by what words the appointment may be made. From what has been said it is obvious that the office is created by a testamentary appointment. This may be either *express* or *implied*. (*Ex parte Morrell*, 2 *Brad.* 32.) It is *express* when the testator, in plain words, nominates, constitutes and appoints a person to be an executor. In like manner any words which either directly or by way of circumlocution, recommend or commit to one or more the charge and office or the rights which appertain to an executor, amount to such appointment. Thus, if the testator say, "I appoint my nephew my residuary legatee, to discharge all lawful demands against my will," the nephew may be admitted as executor. (*Grant v. Leslie* 2 *Phil.* 116.)

So in the case of a nuncupative will by a mariner at sea, when the testator, in extremis, was asked who he wanted to settle his affairs, answered, "I want you to do it," referring to the mate of the vessel, it was said by Mason, J., in delivering the opinion of the court of appeals, that he thought that sufficient to appoint the mate executor of the will. (*Hubbard v. Hubbard*, 4 *Seld.* 203.)

So an executor may be appointed by necessary implication; as where the testator says, I will that A. B. be my executor, if C. D. will not. In this case C. D. may be admitted, if he pleases, into the executorship. (*Godol. pt 2, ch. 5, § 3.*)

An executor may be appointed for a particular time, or for a limited purpose. He may then be appointed general executor in a codicil, by implication and without express words. (*In the goods of Aird*, 1 *Hagg.* 336.) When the appointment is limited the probate should be limited also.

The appointment may be either absolute or qualified. It may be qualified by limitation in point of time, or in reference to the place wherein, or the subject matter whereon the office is to be exercised. A man may be appointed executor at the expiration of five years, or any other time, from the death of the testator. Letters testamentary cannot be granted to him till that time arrives, and in the mean time, administration with the will annexed must be granted, unless an executor is appointed, as he may be, for the intermediate time. It may be limited in point of place; one man being appointed executor for the goods in one place and another

in another. (*Swinb. pt. 4, § 18, pl. 4. Wentworth's Ex'rs, 14th ed. 22.*)

It may be limited as to the subject matter; A. may be executor for the household furniture, B. for the sheep, and so on. (*Lynch v. Bellew, 3 Phill. 424.*)

The appointment may be conditional, and the condition may be either precedent or subsequent. (*Bac. Abr. tit. Ex'rs, C 2.*) But although a testator appoint separate executors for different parts of his property, yet *quoad* creditors, they are all executors and may be sued as one. (*Rose v. Bartlett, Cro. Car. 293.*)

There is nothing in the revised statutes of New York, forbidding or regulating the appointment of special executors. The occasion does not often arise for the action of the courts, with respect to this matter.

An executor had not at common law, nor has he now, the power to assign the executorship to another. (*Bac. Abr. tit. Ex'rs, E 9.*) The office was a trust which continued during his lifetime, and could only be transmitted by will, at his death, to an executor named by himself; and might so be continued from one to another, until the series was broken by an intestacy. (*Shook v. Shook, 19 Barb. 656.*) But this doctrine as to the transmissibility of the office, by executor to executor, is abrogated by the revised statutes. (*2 R. S. 71, § 17.*) On the death of a sole executor or of a surviving executor of any last will, letters of administration with the will annexed, of the assets of the first testator left unadministered, are required to be issued. The power and duties of such administrator will hereafter be considered. The executor of an executor has now no authority, as he had at common law, to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof, as such executor. (*2 R. S. 448, § 11. Shook v. Shook, supra.*)

This was no doubt intended to be an effectual prohibition of actions, as well as proceedings, by an executor of an executor, the subjects of which relate to the estate, effects or rights of the testator of the first executor.

Nor will the court inquire, when an application is made for let-

ters of administration with the will annexed, on the death of a sole surviving executor, whether the appointment will lead to beneficial results. If there be assets of the first testator left unadministered, jurisdiction is conferred upon the court, to grant the letters. (*Pumpelly v. Tinkham*, 23 Barb. 321.)

There was, however, an exception to the rule of transmissibility of the office. On the death of one of several executors the interest of the original testator was held to vest in the surviving executor or executors, and not in the executor of the deceased executor; and this was so whether the surviving executor had renounced or not. The rule is the same at the present day. (*Shook v. Shook*, *supra*. *Wentworth's Ex'rs*, 14 Ed. 215. *Judson v. Gibson*, 5 Wend. 224.)

It was formerly considered, that if an individual interfered with the goods of the deceased, he thereby made himself an executor in his own wrong, or, as it was generally termed, an *executor de son tort*. (2 Bl. Com. 507. *Bacon's Abridg. title Ex'rs* §c. B 3.) But this is no longer the rule. It is now enacted that no person shall be liable to an action as executor of his own wrong, for having received, taken or interfered with the property or effects of a deceased person; but shall be responsible as a wrong-doer in the proper action, to the executors or general or special administrators of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts to the estate of the deceased. (2 R. S. 449, § 17.) This statute takes away the remedy which the creditor before had against the fraudulent vendee and transferred the action to the personal representative of the vendor. He may now sue, or controvert the validity of the sale in any legal form, when that course is necessary for the payment of the debts of the testator or intestate. (*Babcock v. Booth*, 2 Hill, 185, 186.) The court in the same case adopts the language of Chief Justice Savage, in *Doc v. Backentose*, (12 Wend. 543.) that under our present statute, executors and administrators have a new character, and stand in a different relation from what they formerly did to the creditors of the deceased persons with whose estates they are entrusted. They are not now the mere representatives of their testator or intestate; they are constituted trustees,

and the property in their hands is a fund to be disposed of in the best manner for the benefit of the creditors. (1 *Vermilyea v. Beatty*, 6 Barb. 429.)

The intermeddling with the goods of the deceased by a person having no rightful authority to do so, is not a matter now cognizable in surrogates' court, and the doctrines in relation to it do not belong to the subject of this treatise.

SECTION II.

Of the executor's refusal or acceptance of the office, and of the consequences of such refusal.

There are two ways in which an executor named in the will, may, before taking the oath of office, be discharged from his trust. In one of these modes he is *active*, and the other *passive*. The first is by a renunciation of the office, and the last is merely by omitting or declining to take upon him the office.

A renunciation is a written declination of the office of executor, executed in the presence of two witnesses. (2 *R. S.* 70, § 8.) To be effectual it must be proved before the surrogate, who took the proof of the will, and be filed and recorded by him. As a person does not become an executor by intermeddling, it is presumed a renunciation may be received, at any time, or in any stage of the proceedings, if the executor has not taken the oath of office and received letters testamentary. (See Appendix, Nos. 3 and 4.)

In an early case, it was held by the king's bench that an executor by administering had taken upon himself the executorship, and put it out of his power to refuse, and that the ordinary had no jurisdiction to accept a refusal, and grant administration, during his life, *cum testamento annexo* to another. (*Wankford v. Wankford*, (1 *Salk.* 308.) But the law seems to be now in England that the ordinary may accept the executor's refusal, notwithstanding he had administered. (*Wentworth's Ex'rs*, 14th ed. 91.) In *Jackson v. Whitehead*, (3 *Phill.* 577,) an executor who had taken the oath of office and given an appearance in a suit, touching the validity of a will, was allowed to renounce probate and become a witness in the cause. In this case, however, probate was stopped

by a caveat, so that letters testamentary had not been delivered to the executor.

A person might at common law be deemed an executor as to strangers, and yet his renunciation be accepted by the court. (*Wentworth's Ex'rs*, 92.) Such is not the laws in the revised statutes. For it is presumed that on a plea of *ne unque executor*, evidence of an intermeddling is not sufficient to make out the issue on the part of the plaintiff. The proof whether the party is an executor or not, depends on the records of the proper court, and not on any act *in pais*, of the party. (*Vermilyea v. Beatty*, 6 Barb. 429. *Wever v. Marvin*, 14 *id.* 376.)

With respect to the refusal of an executor, at common law, it is laid down that it cannot be, verbally, or by word, but must be done by some act entered or recorded in the spiritual court, and not before neighbors in the country. (*Wentworth's Ex'rs*, 88. 14 *Ed.*)

If the surrogate be appointed executor he has no jurisdiction of the cause, but the right of probate is given to the local officer, in such county, elected to discharge the duties of surrogate, the county judge or district attorney, as the case may be. (See 2 *R. S.* 79, § 48, *as amended in 1830, and as amended by law of 1843, ch. 121, § 1. L. of 1847, ch. 470, § 32. 3 R. S.* 165, 166, 5th *ed.*)

In England, if a party renounces in person, he takes an oath that he has not intermeddled with the estate, and that he will not intermeddle with a view of defrauding creditors. (*Toller*, 42.) This is not required by the revised statutes, and does not seem to be necessary.

It remains under this section to consider the refusal of an executor to serve, he being *passive*. This comes by his refusal or neglect to appear before the surrogate and take the oath of office, in which case if his co-executor appears probate is granted to him, and the authority of the executor not appearing is thus superseded. (*Wever v. Marvin, supra. Lawrence v. Lawrence*, 3 Barb. Ch. 74.) But he may, at any subsequent time after the death of the co-executor, appear and qualify, in which case letters testamentary will be granted to him. So also, if he has actually renounced, he cannot, as a matter of course, retract his renunciation until after the death of the executor to whom letters were issued. (*Judson*

v. *Gibson*, 5 *Wend.* 227.) When all renounce, and administration with the will annexed has been actually granted, it is too late to retract the renunciation, at least during the life of the administrator. (*Toller's Law of Ex'rs*, 422. *Robertson v. McGeoch*, 11 *Paige*, 642.) The general rule with respect to retraction seems to be, that it must be made before other parties have acquired rights, by the action of the probate court upon such renunciation. (*Id.*)

If there be several executors named in the will, admitted to probate, and no objections be filed against the granting of letters testamentary to them, it would seem that the surrogate may issue such letters to any one of them who appears and takes the oath of office, without requiring the others who do not appear to renounce the appointment. The surrogate has no jurisdiction to summon the non-appearing executors to take upon themselves the burden of the office, except upon the application of another executor, or of the widow, or some one of the next of kin, or a legatee or creditor of the testator. If neither of them require the action of the court, in that behalf, and the time for issuing letters has arrived, it would seem that the surrogate may issue the letters to the one who appears and qualifies, the effect of which will be to supersede the executor not appearing, *until he shall appear and qualify*. (2 *R. S.* 71, § 15.) There is a strong implication from the language of this section, especially when compared with the 9th, 10th, 11th and 12th preceding sections, that the non-appearing executor, who is thus superseded, may appear at any time, even before the death of those to whom letters have been granted, and on taking the oath of office, be entitled to supplementary letters testamentary, which will have the effect to join him in the administration of the estate, with those to whom letters were originally granted.

It was probably to prevent the inconvenience which might result from such a course that the provision was made in the sections alluded to, authorizing the surrogate, on the application of those interested, to compel the defaulting executor to appear and qualify within a certain time therein to be limited, or in default thereof that he will claim to have renounced the appointment. (2 *R. S.* 155, 156, § 9 to 12, 5th ed.) It is probable that the order of the

surrogate, in such a case, declaring and decreeing that such person has renounced his appointment as such executor, will have the same effect as if he had renounced the appointment by an instrument in writing proved before the surrogate and recorded, and prevent his retraction of it till the death of the last surviving executor to whom the letters were granted.

The old authorities are that when there are divers executors named in the will, and some of them refuse and others prove the testament, they who refuse may, after at their pleasure administer, notwithstanding such refusal, before the ordinary. (*Burn's E. L. title Wills, Probate, p. 611.*) And this, the same author says, is called a double probate, which is in this manner; the first that comes in, takes probate in the usual form, with reservation to the rest. Afterwards, if another comes in, he also is to be sworn in the usual manner, and an engrossment of the original will is to be annexed to such probate in the same manner as the first; and in the second grant, such first grant is to be recited. And so as if there be more that come in afterwards. (*Id.*) For notwithstanding their refusal at first, they still continue executors; and at any time during the lives of their companions they may prove the will, pay debts, make releases, and must be joined in all suits where the co-executors are plaintiffs, because they are all privy to the will; but not when they are defendants, because the plaintiff is not bound by law to take notice of any but those who have proved the will. (*Id. Swinb. ch 444.*) In *Bodle v. Hulse*, (5 *Wend.* 313,) this doctrine is recognized. The proper practice, says Savage, Ch. J., is, when one renounces, to prosecute in the name of all the executors named in the will, if living, and on summons to those who will not join, there will be a judgment of severance, and then the others proceed and recover in their own names. (*Toller*, 44, 45. 3 *Bacon*, 32. *Cro Jac.* 420. *Hensloe's case*, 9 *Coke*, 37.) The case of *Bodle v. Hulse*, (*supra*,) arose before the revised statutes. The effect of declaring that the issuing of letters testamentary to one, is a supersedeas to all named in the will, and not named in the letters testamentary, operates as an abrogation of the rule requiring all to join in an action, whether named in the letters, or not. Be that as it may, the legislature, at a later day, removed all doubts on the subject, by enacting, that in actions

brought by or against executors, it shall not be necessary to join those as parties, to whom letters testamentary shall not have been issued, and who had not qualified. (*Laws of 1838, p. 103. Lawrence v. Lawrence, 3 Barb. Ch. 74.*) This statute, although it settles the question as to the effect of the supersedeas upon parties to an action, does not take away the right of retraction when the person to whom letters have been issued is dead. It is presumed that doctrine remains unaltered.

CHAPTER VI.

OF PROBATE, AND OF THE PROOF AND RECORDING OF WILLS OF REAL ESTATE.

SECTION I.

Of Probate.

There has been some diversity of opinion as to what is meant by the probate of a will. Formerly it was supposed to consist of a copy of the will, a certificate, under the seal of the court, that it was such copy, and the certificate of the proof of the will, all of which were annexed to the letters testamentary, under the seal of the court. (*Kirtland's Sur. p. 46.*) In many, perhaps most of the counties, the same practice is continued at the present day. It is believed, however, that the English practice did not treat the letters testamentary as a part of the probate. (1 *Wms. Ex'rs*, 317.) The revised statutes speak of the letters testamentary as a different instrument from the probate, the former as being the foundation of the latter. It is provided that they cannot be issued until after the will has been admitted to probate, nor then, until after the expiration of thirty days, provided objections to such issuing of them are filed by interested parties, unless the objections are sooner disposed of. (3 *R. S.* 154, §§ 1, 2, 5th ed.) The letters testamentary are the commission to the executors, and give them a standing in court. (*Dayton's Sur.* 194.) It is the letters testamentary alone, of which profert is made in an action by the executor to recover a debt due to the testator in his lifetime. (2 *Chitty's Pl.* 56.) It affords authentic evidence that the will has

been admitted to probate, by the proper surrogate. The decree of the surrogate having jurisdiction, declaring a will of personal property duly executed, is conclusive evidence, in a collateral action, of such execution, notwithstanding it be shown that there was but a single subscribing witness to the will. (*Vanderpoel v. Van Valkenburgh*, 2 *Seld.* 190. 2 *R. S.* 61, § 29.) It remains such evidence until such probate is reversed on appeal, or revoked by the surrogate, or the will is declared void by a competent tribunal. (*Id.*) (For form of probate and letters see Appendix, No. 21.)

No right can be asserted in any court under such will, nor can any power be exercised by an executor named therein, except to pay funeral charges, and to do such acts as are necessary for the preservation of the estate, until the will is admitted to probate and letters testamentary are granted. (2 *R. S.* 71, § 16.)

Nor are the letters testamentary, as in England, merely operative as the authentic evidence of the executor's title. They impart to him nearly all the power he possesses of carrying into effect the will of the testator. Without them he cannot pay a debt of his testator, or in any way charge the estate. The acts which he is permitted to do before the granting to him of letters testamentary, are such as any stranger might perform, at common law, without being deemed an executor *de son tort*.

Before the revised statutes, the rule prevailing in England, obtained here, of considering the probate, by which in common parlance was embraced not only the proof of the will but the granting of letters testamentary thereon, as merely the authenticated evidence, and not at all as the foundation of the executor's title. Upon those principles it was held as a legitimate consequence, that an executor, before proving the will, might do almost all the acts incident to his office, except some of those which related to suits. Thus it was decided that he might seize and take into his hands any of the testator's effects; he might enter peaceably into the house of the heir, for that purpose, and take specialties and other securities for the debts due to the deceased. He might pay or take releases of debts owing from the estate, and he might receive or release debts which were owing to it. So he might sell, give away, or otherwise dispose of, at his discretion, the goods and chattels of the testator; he might assent to or pay legacies; and he

might enter on the testator's terms for years, and all before probate. (*Bac. Abr. tit. Ex'rs and Adm'rs, E 14. Wentworth's Off. of Ex'r, 14th ed. 81 et seq.*)

Although the power of the executor before probate, is now greatly restricted from what it formerly was, yet in many respects the probate when granted, is said to have relation to the time of the testator's death. The law, for certain purposes, does not recognize an interval as existing between the testator's death and the issuing of letters testamentary to his executors. The rights in relation to the personalty, which existed in the former, in his lifetime, are deemed by legal fiction to be vested at his death in the latter. This retrospective operation of the probate is necessary, in some instances, for the purpose of justice. Without it damages could not be recovered for an injury to the personal property of the deceased, committed after the death of the testator and before probate of his will. The same doctrine of relation extends to criminal proceedings. Hence, if a man die, having made a will and appointed an executor, the goods shall be supposed to be the goods of the executor, even before probate is granted to him. (*2 Russell on Crimes, 99. 1 Hale, 514.*) The revised statutes have not interfered with this doctrine.

At common law, an executor might commence an action before probate. It was enough if he had obtained the letters testamentary before declaring, and made profert of them in his declaration. This made the commencement of the suit good by relation. (*Bac. Abr. Ex'rs and Adm'rs, E 1, p. 14.*) The same rule applied in equity. (*Humphreys v. Humphreys, 3 P. Wms. 351.*) But this doctrine has been abrogated by the revised statutes, and no suit can be commenced by executors, previous to the granting to them of letters testamentary. (*Thomas v. Cameron, 16 Wend. Rep. 579.*)

Having thus shown, in a general way, what an executor may do before probate, and to what extent the law of relation has been modified by the revised statutes, it will be proper next to inquire in what court the application for probate is to be made. It will be more convenient to consider, in a separate section, the proceed-

ings to record a will of real estate. The doctrine in relation to probate has reference to wills of personal property alone, or to wills of a mixed character, disposing of both real and personal property. There are some proceedings which are common to both cases, and it will therefore be impossible to avoid all repetition.

Under the act of 1813, (1 *R. L.* 444,) and while the court of probate was an existing tribunal, the surrogates of the different counties had no jurisdiction to prove the will, or grant letters of administration of the estate of a person, not an inhabitant of this state, who died either within it or out of it, or of a person, being an inhabitant, who died out of the state. In both those cases the jurisdiction was in the court of probate. The power of the court did not depend on the question of assets. (*Hart v. Coltrain*, 19 *Wend.* 380. *Weston v. Weston*, 14 *John.* 428.) It was governed by the law of domicil. The jurisdiction of the surrogate depended on the fact, that the deceased person, at or immediately previous to his death, was an inhabitant of the same county with the surrogate.

When the court of probate was abolished it became necessary to confer the jurisdiction it possessed upon some other tribunal. This, so far as relates to testamentary matters, now rests upon the revised statutes as amended by the act of 1837, ch. 460, § 1, (3 *R. S.* 363, 5th ed.) They provide that the surrogate of each county, (and this embraces any other officer who by law is required to discharge the duties of the office,) shall have jurisdiction, exclusive of every other surrogate within the county for which he may be appointed, to take the proof of last wills and testaments of all deceased persons, in the following cases :

1. Where the testator, at or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened.

2. Where the testator, not being an inhabitant of this state, shall die in the county of such surrogate, leaving assets therein.

3. Where the testator, not being an inhabitant of this state, shall die out of the state, leaving assets in the county of such surrogate.

4. Where a testator, not being an inhabitant of this state, shall

die out of the state, not leaving assets therein, but assets of such testator shall thereafter come into the county of such surrogate.

5. Where no surrogate has gained jurisdiction under either of the preceding clauses, and any real estate devised by the testator shall be situated in the county of such surrogate.

These provisions embrace nearly all the cases which can arise. But as there are no words of exclusion, and the clause in the revised statutes forbidding the exercise of jurisdiction, not expressly given by some statute of this state, has been repealed; (*see 2 R. S. 220, 221, § 1, and repealing law of 1837, p. 536*;) it has been held that in a *casus omissus*, the surrogate should not decline jurisdiction, because the law is silent as to the *mode* in which it is to be exercised, where it is apparent that a proper occasion to invoke his authority has arisen. The statutes regulate so far as they go, the exercise of the jurisdiction in the particular instances specified. (*Kohler v. Knapp*, 1 *Bradf. Sur. Rep.* 245.) It was well observed by the learned surrogate, in the case just cited, that there are some cases not reached by the letter of the act, and in regard to which, the jurisdiction of the surrogate still subsists, though not expressly regulated. The case of a person not an inhabitant of this state, dying in the county of the surrogate, and leaving no assets there, but leaving assets in another county; and that of a person, not an inhabitant, dying in the county, leaving no assets, but assets thereafter coming into the county, are not provided for, in terms, by the revised statutes. (*Id.* 2 *R. S.* 91.)

It is proposed in the next place to point out the manner of obtaining probate, and to notice the practice of the surrogate's court with respect thereto.

At common law the proper person to cause the will to be proved was the executor named in it. Until renunciation, he was deemed the sole person competent to be a party for the purpose, unless in case of fraud or collusion. The New York statute authorizes the executor, devisee or legatee named in the will, or any person interested in the estate, to prove the will before the proper surrogate; either for probate or as a will of real estate. (*L. of 1837, p. 524, § 4. 3 R. S. 146, § 49, 5th ed.*) It is competent, there-

fore, for a legatee to make the application for probate, and even when it has already been made by the executor, to intervene for the purpose of having the will proved and his interest protected. (*Walsh v. Ryan*, 1 *Bradf.* 434. *Foster v. Tyler*, 7 *Paige*. 52.) (For petition for citation, &c. &c., see Appendix, 5 to 11.)

If the will be lost or destroyed, the surrogate's court has no jurisdiction to establish the will. (*Bulkley v. Redmond*, 2 *Bradf.* 281, 286.) In such a case whether the will be a will of real or personal estate, and whether it be lost or destroyed by accident or design, the former court of chancery, now the supreme court, possesses the power by statute to take proof of the execution and validity of such will, and to establish the same, as in the case of lost deeds. (2 *R. S.* 67, § 63. 3 *id.* 153, 5th ed.) The mode of conducting the proceedings in the supreme court, belongs to a treatise on the practice of that court, and is not within the scope of the present work.

The decree of the court, establishing such will, is required to be recorded by the surrogate of the county, to whom probate would have belonged, if such will had not been lost or destroyed, and letters testamentary, or letters of administration with the will annexed, as the case may be, are to be issued thereon, in the same manner, as upon wills duly proved before him. (2 *R. S.* 67, § 64.)

At common law, if the executor had not the will in his custody, but some other person, the latter might be compelled to exhibit it to the court. The revised statutes, as originally framed, authorized the surrogate on the application of any person interested, to issue a citation to such person having the will, requiring him to produce the same at such time and place as he should deem reasonable, to the intent that it might be proved. The neglect or refusal to produce the will in obedience to such citation subjected the defaulting party to imprisonment until he should produce it. (2 *R. S.* 60, § 25.) But this section was repealed by the act of 1837, page 536, and none was substituted in its place.

The only existing provision compelling the production of a will before the surrogate, is that by the 10th and 11th sections of the first title, chapter 6, of the revised statutes, (2 *R. S.* 58; 3 *id.* 139, 5th ed.) Those sections authorize the issuing of a subpoena *duces tecum* by the surrogate, commanding the person who has the cus-

tody of the will to produce the same before the surrogate for the purpose of its being proved. Disobedience to the writ is punishable by imprisonment, until such will is produced. These sections originally related only to wills of real estate, but by the act of 1837, page 528, § 18, they are made applicable to wills of both real and personal estate, or either, and to a proceeding by citation as well as by notice.

Hence the practice would seem to be, to apply to the court for the subpoena *duces tecum*, after the preliminary proceedings had been taken to prove the will. An order should be entered in the minute book, authorizing the issuing of the subpoena *duces tecum*. (See Appendix, Nos. 12, 15.)

With respect to the manner of proving the will for probate, there were formerly two ways, to wit, the *common form* and *per testes*.

A will was said to be proved in common form, when the executor presented the will to the court and produced one or more of the witnesses to prove its execution. This was done in the absence and without citing any of the parties interested, and was formerly the practice in this state. One objection to this mode was, that at common law, the executor was liable, at any time within thirty years, on the application of any person having an interest, to prove the will in solemn form by all the witnesses. (1 *Jarman on Wills*, 219, *Perkins' ed.*) Thus, the probate granted on the proof in common form, was constantly in danger of being revoked, during that period.

The mode of proving a will in common form is in effect superseded by that pointed out in the statute, and will soon be considered. The period of thirty years within which, notwithstanding the will was admitted to probate, its validity might be contested, is by the revised statutes reduced to one year. (2 *R. S.* 61, § 30.)

To prove a will in *solemn form, per testes*, at common law, all those persons to whom the administration of the goods of the deceased would belong, in case he died intestate, must be cited to be present at the "probation and approbation of the testament." A will thus propounded and proved *per testes*, was conclusive upon all the next of kin who were cited to "see proceedings." (*Newell v. Weeks*, 2 *Phill.* 224. *Bell v. Armstrong*, 1 *Add.* 365, 372.)

Within one year after a will has been admitted to probate with us, though it be conclusive in all collateral actions, and upon the parties cited, until it is reversed on appeal, or revoked by the surrogate, or the will be declared void by a competent tribunal, its validity may be contested. (2 R. S. 61, § 29. *Collier v. Idley's Ex'rs*, 1 *Bradf.* 94.) And on such contest the executor is bound to bring in his proof *de novo*, as upon the original application for probate. (*Id.*) The mode in which that contest is to be conducted, and the history of the changes in this state, will be found well stated in the opinion of the learned surrogate of New York, in the case last cited.

The practice in this state is regulated by statute, and repeals, by implication, the old practice, of a proof in common form.

The statute, after prescribing that the executor, devisee or legatee, or any person interested in the estate, may have the will proved before the proper surrogate; (*Laws of 1837, p. 524, § 4; 3 R. S. 146, § 49, 5th ed.;*) points out specifically the facts which the surrogate is required to ascertain, by satisfactory evidence, in case the will relates to personal estate alone, or to both real and personal estate. In the former case, he is to ascertain the names and places of residence of the widow and next of kin of the testator, or that upon diligent inquiry the same cannot be ascertained. (*L. of 1837, p. 525, § 5. 3 R. S. 146, § 50, 5th ed.*) He is also required to ascertain whether any and which of the persons mentioned are minors, and the names and places of residence of their general guardians, if they have any; and if there should be no general guardian within this state, he is required by an order to be entered to appoint a special guardian for such minor, to take care of his interest in the premises; and the written consent of every person so appointed special guardian to serve as such, must be filed with the surrogate. The testamentary guardian named in the will to be proved, cannot for this purpose be deemed a general guardian.

The surrogate is thereupon required to issue a citation, requiring the proper persons, at such time and place as shall be therein mentioned, to appear and attend the probate of the will. The citation is required to state who has applied for the proof of the will,

and whether it relates exclusively to either real or personal estate, or to both real and personal estate. It must be directed to the proper persons by name, stating their places of residence; or if any of them are minors, to their guardians by name, stating their places of residence. If the name or place of residence of any person who ought to be cited cannot be ascertained, such fact must be stated in the citation.

The statute then directs how the citation shall be served on the persons to whom it is directed. This is as follows: 1. On such as reside in the same county with the surrogate, or an adjoining county, by delivering a copy to such person, at least eight days before the day appointed for taking the proof; or by leaving a copy at least eight days as aforesaid, at the dwelling house, or other place of residence of such person, with some individual of suitable age and discretion, and under such circumstances as shall induce a reasonable presumption in the mind of the surrogate, that the copy came to the hands or knowledge of the person to be served with it, in time for him to attend the probate of the will. 2. On such as reside in any other county in this state, by delivering a copy personally to such person, or leaving it at his dwelling house, or other place of residence, in the manner and under the circumstances above mentioned, at least fifteen days before the day appointed for taking the proof. 3. On such persons as do not reside in this state, by delivering a copy personally to such persons, or leaving it at his or her dwelling house, or other place of residence, not less than fifteen days nor more than ninety days before the day appointed for taking proof of the will; and on such persons as do not reside in the state, or whose places of residence cannot be ascertained, by publishing a copy of the citation in the state paper for six weeks previous to the day appointed for taking the proof. (*L. of 1837, p. 525. Id. 1840, p. 325. 3 R. S. 147, § 53.*)

Before proceeding to take the proof of the will, the surrogate is further to require satisfactory evidence by affidavit, of the service of the citation in the mode prescribed by law. If it has not been duly served on all the persons who ought to receive notice, he may adjourn the proceedings and issue a further citation for the purpose of bringing in such persons. (*Laws of 1837, pp. 525, 6. 3 R. S. 148, § 55, 5th ed.*)

The citation, it has been seen, must be directed to the proper persons by name. It is not enough that it is directed to the widow and next of kin, alone. This requirement is no more than was insisted on by the English ecclesiastical courts, in analogous cases. (See *Burn's E. L. tit. Citation.*) (See Appendix, for form No. 10.)

The language of the statute will be satisfied by an application, *ore tenus*, to the surrogate for the citation, and by making the requisite preliminary proofs on an oral examination of witnesses, or by an affidavit containing the requisite facts. But it is more conformable to the ordinary proceedings of other courts in similar proceedings, and equally a compliance with the requirement of the statute, to present a petition in writing to the surrogate, duly verified, setting forth all the facts specified in the statute, and asking for the proper action of the surrogate in the premises, together with a prayer for process. No further proof would be needed in the first instance. (For form of petition, see Appendix, No. 5.)

In proving the will for probate, which we are now considering, the heirs at law, unless they are the same persons as the next of kin, are not proper parties. This will be shown more fully in the next section, when we come to treat of proving a will of real estate, with a view to its being recorded as such before the surrogate.

The term *next of kin*, in the statute, is understood to embrace only that class of persons to whom administration of the estate of the deceased would be committed in case of intestacy. (1 *Wms. Ex'rs*, 281.) It does not embrace the representatives of a deceased next of kin, although such representative might be entitled, under the statute of distributions, to a distributive share of the estate of the deceased, had he died intestate. Such representative is not entitled to administration, if a relative nearer akin will accept. (2 *R. S.* 74.*)

In ascertaining who are the next of kin, it is the practice to look back to the time of the testator's death. Those who are the next of kin at that time are understood to be the persons intended

* Mr. Dayton, in his Office of Surrogate, page 143, seems to intimate that all should be cited who are entitled to share in the personalty, under the statute of distributions. Sed Quere ?

by the act, and not those who may, by the subsequent death of others, become next of kin at the time the question arises. Such is the rule in granting administration. If the person entitled to administration, as next of kin, dies, without obtaining letters, the surrogate is not bound to grant administration to one who is not entitled to a beneficial interest in the effects, although by the death of intermediate persons he may have become next of kin at the time the grant is required. This construction satisfies the letter as well as spirit of the statute, and is conformable to the English practice. (*Savage v. Blythe*, 2 Hagg. App. 150, where the whole doctrine is discussed.)

A person may be entitled to distribution who is not entitled to administration, and therefore the statute of distributions does not afford the test as to the persons entitled while any person who was next of kin at the death of the deceased, is living. But when all the original next of kin are dead, the practice of the prerogative court is to grant administration to the person entitled to the beneficial interest, whether next of kin or not. (*Id.*) And it is presumed, if all the persons who were next of kin of the testator are dead, before a will is offered for probate, the citation should be served, as in the English practice, on the persons having the beneficial interest, under the statute of distributions, without regard to proximity of blood. By the death of intermediate persons, it may happen that persons who have become next of kin have no interest in the estate. It would be idle to cite them to attend the probate of a will, when they could have no motive to be present. Such a case is not within the statute, and the court is left to proceed as at common law. Those who have the interest would, in such case, clearly be entitled to administer, and of course are the persons on whom the citation to attend the probate of the will should be served. (*Savage v. Blythe*, *supra*. *Almes v. Almes*, 2 Hagg. App. 155.)

In accordance with these principles, in a case before the surrogate of New York, where it appeared that the deceased, at the time of her death, was a married woman, it was held that the citation to her next of kin was not sufficient to authorize the proceeding, and that a new citation must issue to the husband. (*Lush v. Alburtis*, 1 Bradf. 456.) By the acts of 1848 and 1849, authorizing mar-

ried women to take, hold, convey and devise property, they may make valid wills. But as no special provision is made in the acts touching the probate of their wills, it is necessary to fall back on the principles of the common law, regulating the procedure of the court. Notwithstanding those acts relative to the rights of married women, the surplus of their personal estate, when they die intestate, leaving a husband surviving them, belongs, after the payment of debts, to the husband or his representatives, and not to the next of kin of the wife. The relatives of the wife, therefore, in such a case, have no interest, and are not necessary parties to the proceeding. (*Id.*)

In case it should be required to publish a notice or a copy of the citation in the state paper, if there be a contest as to which is the rightful paper, it will be sufficient that the proprietors of the paper in which it is published were acting under color of an appointment, and exercising the functions pertaining to the official character *de facto*. (*Wickwire v. Chapman*, 15 Barb. 304, *per Johnson, J.*)

By the act of 1840, p. 326, § 2, it is provided that where a will of personal estate duly executed in this state by a person not a resident of this state, shall in the first instance have been duly admitted to probate in a court of a foreign state or country, letters testamentary or of administration with the will annexed, may be issued thereon by any surrogate having jurisdiction, upon the production of a duly exemplified or authenticated copy of such will, under the seal of the court in which the same shall have been proved. (3 R. S. 147, 148, § 54, 5th ed.)

This statute introduces an important change in international jurisprudence. While it is generally admitted that a will of personal estate must, in order to pass the property, be executed according to the law of the place of the testator's domicile, (*Story's Conflict of Laws*, § 468,) yet the executors named in the will cannot intermeddle with or sue for the effects of the testator in another state, unless the will be proved in the latter state, or it is permitted by some law of the state. (*Kerr v. Moon*, 9 Wheat. 565.) Letters testamentary give to an executor no authority to sue for personal estate of the testator out of the jurisdiction of the state by which they are granted. (*Id.*) Hence the statute

of 1840 affords a short and convenient mode, of authorizing a foreign executor to pursue the property of the testator in the courts of this state.

In case any of the next of kin are under the age of twenty-one years, we have seen that the surrogate is to appoint a special guardian, for such as have no general guardian; *and this before the citation issues.* (*See ante, p. 152.*) This latter provision was first made by the law of 1837. The general principles with respect to proceedings in surrogates' courts, where infants were parties, were fully explained in 1833, in the case of *Killett v. Rathbun*, (4 *Paige*, 106 *et seq.*) The citation of a minor, the chancellor observes, "should be served in the presence of his legal guardian, or in the presence of some person upon whom the actual care or custody of the minor for the time being has properly devolved; and evidence of the service of the citation on the minor merely, is not sufficient, especially if the minor is so young as to be incapable of understanding the object or intent of such service. (*Cooper v. Green*, 2 *Add. E. R.* 454. *Law Pr. E. Courts*, 59.) The citation in such case should direct the minor to appear according to law, that is, by his guardian lawfully instituted. (*Law's Pr.* 88. 1 *Bro. Civ. and Adm. L.* 454.) And if a minor who is cited before the surrogate has no general guardian, or if the general guardian has an interest adverse to the rights of the minor, so that he cannot act as guardian in relation to that matter, a guardian *ad litem* may be appointed by the surrogate to protect the rights of the minor."

It is a power incident to all courts to appoint guardians ad litem for infants. (*Hargrave*, No. 70, to *Co. Lyt.*) The mode in which this is to be exercised in courts of record, as to appointing a next friend for an infant plaintiff, or guardian ad litem for an infant defendant, is prescribed by statute. (*Code of Procedure.*)

In proceeding to prove a will of real estate before the surrogate, power was given to appoint a guardian ad litem for infant heirs, who have no general guardian, (2 *R. S.* 57,) but this was altered in 1837, and the appointment of a guardian ad litem for infants was placed upon the same footing, whether the will was to be proved as a will of real estate or only admitted to probate. (3 *R. S.* 147, § 51, 5th ed.)

On an application before the surrogate for the sale of real estate of the deceased for the payment of debts, a guardian ad litem must be appointed for the infant devisees or heirs of the deceased, who must be a disinterested freeholder. If any of the minors are within the county of the surrogate, they are required to be personally served with notice five days previously, of the intention to apply for such appointment, in order that they may be heard in the selection of the guardian. And where the minor is under fourteen years of age, the notice must be served on the person in whose custody he may be, or with whom he may live, or on such relative as the surrogate shall designate, instead of a personal service. If he has a general guardian in the county of the surrogate, such general guardian is required to appear and take care of the interest of the minor, and in that case no special guardian need be appointed in the premises. (3 R. S. 187, § 4 to 7, 5th ed.)

As the proceedings for recording wills of the real estate and for the sale of the real estate of deceased persons for the payment of their debts did not belong to the common law jurisdiction of the court, a legislative provision for the appointment of guardians ad litem was deemed necessary. In all other cases, the right to make the appointment is an incidental power of the court at common law.

If the heirs or next of kin, or either of them, be a married woman, the proper course is to serve the citation on both the husband and wife. (*Keeney v. Whitmarsh*, 16 Barb. 141. *Bleecker v. Lynch*, 1 Bradf. 458.) The statute does not, in terms, require such service, when the sole interest is in the wife, but it is deemed most prudent to do so. (*Bibby v. Myer*, 10 Paige, 220.)

The mode of making the appointment of a guardian ad litem for an infant complainant should be on petition signed by the minor, if above the age of fourteen years, or by some relative in his behalf, if under that age. The proposed guardian should sign a written consent, which should be duly proved by affidavit, unless signed in open court, and filed. An order for the appointment should be thereupon entered in the minute book, and the appointment made out, under the seal of the court. This appointment should regularly be made before the commencement of the proceedings. (Appendix, No. 5 to 8.)

For an infant defendant, in cases not specially regulated by statute, the guardian ad litem is usually appointed on the return of the citation. If it is made on the application of the minor, in obedience to the injunction of the citation, similar proceedings should be adopted to those described above, as required to be pursued by an infant complainant. But if, as is more usual, the infant omits to appear, the court then, on motion of the complainant, appoints some discreet person, whose interest is not adverse to that of the minor, and who will consent to act. (*Knickerbacker v. DeFreest*, 2 Paige, 304. *In the matter of Frits*, Id. 374.) The practice should be assimilated to that under the code in courts of record. The provision of the code is that on neglect of the infant to apply for the appointment of a guardian ad litem, any other party to the action, or a relative or friend of the infant, may make the application after notice to the general or testamentary guardian of such infant, if he has one within this state, if he has none then to the infant himself, if over fourteen years of age and within this state, or if under that age and within the state, to the person with whom the infant resides. (*Code of 1852*, § 116, sub. 2.)

The same steps are taken to admit a will to probate, on the application for letters of administration with the will annexed, as are pursued by an executor. (For the pleadings in such cases, see part 1, § 5, on the pleadings and process in surrogates' courts, ante.)

We shall postpone to a subsequent section the subject of testimony in testamentary causes. Assuming that the testimony taken before the surrogate on the return of the citation, or on some other day to which the cause has been adjourned, is such as to satisfy him of the genuineness and validity of the will, he then admits it to probate, by an order entered in the minute book. The will is then to be recorded in the book of wills, and the testimony taken in the book of minutes; and the surrogate is required to enter in his minutes the decision which he may make concerning the sufficiency of the proof or validity of any will which may be offered for probate; and in case he shall decide against the sufficiency of the proof or the validity of any such will, he shall, without fee or charge, state the ground upon which the decision is made, if re-

quired by either party. (*Laws of 1837, p. 528, § 21. 3 R. S. 150, § 69, 5th ed.*) A certificate of the proof is made out, annexed to a copy of the will, and is sealed with the seal of the court. This certificate is recorded with the will, and the record, both of the will and the certificate, are certified by the surrogate. The copy of the will, and the proper certificates of proof under the seal of the court, constitute the probate of the will. (See ante, page 145, and the forms in the Appendix, No. 21.) These proceedings do not authorize the executor to do any act. They are the foundation for the letters testamentary. (See Appendix, No. 22)

Under the former laws of this state, letters testamentary issued to the executor immediately upon the granting of probate, on the executor's taking the oath prescribed by law. The revised statutes restrained the issuing of letters testamentary until the expiration of thirty days after probate, to enable those interested in the estate to file objections against any of the executors named in the will. (2 *R. S.* 69, § 2.) The law of 1837, § 22, (3 *R. S.* 154, § 2, 5th ed.) permitted them to be granted at any time after the will should have been proved, unless an affidavit should be made by the widow, legatee, next of kin, or a creditor of the testator, setting forth that such person intended to file objections against the granting of such letters testamentary, and that he was advised and believed that there was just and substantial objections to the granting of such letters to the executors named in the will, or some or one of them. Upon filing such affidavit with the surrogate he is required to stay the granting of letters testamentary, at least thirty days, unless the matter shall be sooner disposed of. It is presumed that this period of thirty days is to be computed from the filing of the affidavit and not from the date of the probate, if they occur on different days. (*Burwell v. Shaw, 2 Brad. 322.*)

Letters testamentary run in the name of the people, and are tested in that of the surrogate, when issued by him, and are issued under his seal of office, and signed by him. If issued by any other officer, discharging the duties of the office of surrogate, they are tested in the name of such officer. If issued by the county judge, or district attorney, as they may be in certain cases where the surrogate is disqualified to act, they must be tested in the

name of such officer, and issued under the seal of the county court. (2 *R. S.* 80, § 55. 3 *id.* 167, § 73, 5th ed. *Laws of 1847*, p. 329.)

When issued by the surrogate, they are required to be recorded in the book provided for that purpose, and the record thereof to be duly certified. They cannot be issued until the executor has taken and subscribed an oath or affirmation before the surrogate, or in case of his sickness or other inability to attend the surrogate, before any officer authorized to administer oaths, that he will faithfully and honestly discharge the duties of an executor. This oath must be filed with the surrogate. (2 *R. S.* 71, § 13.) The 59th section of the act of 1837, p. 534, permits this oath to be taken in all cases, not only before the surrogate, but also by a commissioner of deeds, supreme court commissioner, or judge of the county courts. Since the office of supreme court commissioner has been abolished by the constitution of 1846, it is presumed it may be taken by any officer by whom the functions of the supreme court commissioners are now discharged. (*Hayner v. James*, 17 *N. Y. Rep.* [3 *Smith*,] 316.) In Kings county the clerk or clerks of the surrogate of that county are vested with power to administer this oath. (*Laws of 1849*, p. 235.) And in the city and county of New York the same authority is given to the assistants appointed by the surrogate. (*Laws of 1850*, p. 384.)

The usual time for taking this oath is immediately preceding the issuing of the letters testamentary. It is presumed, however, that it may be administered at any time after the will has been admitted to probate, if no objections be filed. (For form of oath, see Appendix, No. 19.)

The statute provides that all wills whenever proved according to law, except such as are required to be deposited, shall, after being recorded, be returned on demand to the person who delivered the same; or in case of his death, insanity or removal from the state, to any devisee named in such will, or to the heirs or assigns of such devisee; or, if the same relate to personal estate only, to any acting executor of such will, or administrator with the will annexed, or to a legatee named therein. (2 *R. S.* 66, § 54.)

We have already spoken of cases arising under the act of 1840, (See ante, page 156,) where a will of personal estate, duly execu-

ted within this state by a person not a resident of this state, shall have been duly admitted to probate in a court of a foreign state or country, and have shown under what circumstances the surrogate having jurisdiction, may issue letters testamentary or of administration with the will annexed upon the production of a duly authenticated copy of such will, under the seal of the court in which it shall have been proved. But this statute does not cover the whole ground. The act of 1840 applies only to the will of non-residents, *duly executed within this state*.

But a different case may arise, where a person not an inhabitant of this state shall die at home, leaving assets in this state. In such a case if no application for letters of administration be made by a relative entitled thereto, and legally competent, and it shall appear that letters of administration on the same estate, or letters testamentary, have been granted by competent authority, in any other state of the United States, then our statute provides that the person so appointed, on producing such letters, shall be entitled to letters of administration in preference to creditors or any other person except the public administrator of New York. (2 R. S. 75, § 31.) This administration is granted without citation, and is doubtless auxiliary to the original administration. The statute provides only for the case of persons *not inhabitants* of this state, *leaving assets in this state*. Should such person die, leaving no assets in this state, and assets, *after his death*, should come to the state, or for any reason the obtaining a grant of administration, or of letters testamentary in this state become necessary, the foreign executor or administrator must proceed as at common law to obtain them. Nor does the statute aid any other executor or administrator, than such as is appointed by some other of the *United States*. If the appointment proceeds from a foreign government, other than one of the United States, an appointment must be obtained here, in the same way as if no previous appointment had been made.

It has been repeatedly decided and may be said to be a fixed rule, that the executor or administrator of a person who dies in a foreign land and receives his appointment from a foreign tribunal, cannot maintain an action here by virtue of the letters testamentary or letters of administration granted to him abroad. But the appointment of the foreign tribunal will be considered sufficient

authority for the proper court to issue an ancillary probate, or letters of administration, as the case may be. (*Fenwick v. Sears*, 1 *Cranch*, 259. *Dixon's Ex'rs v. Ramsay*, 3 *id.* 319, 323. *Kerr v. Moore*, 9 *Wheat.* 565. *Morrell v. Dickey*, 1 *John. Ch.* 153.) The rule as settled in England, and by the usage of all civilized nations, as to the validity of wills made abroad, and the succession and distribution of the real and personal estate of foreigners, has repeatedly been declared to constitute a part of the municipal jurisprudence of this country. (*Id.*)

The rule at common law is this; if a will be made in a foreign country and proved there, disposing of personal property in this country, the executor must prove the will here also. (*Tourton v. Flower*, 3 *P. Wm.* 369.) So if the testator was domiciled in Scotland, and left assets there and in England, the will is proved in the first instance in the court of great sessions in Scotland, and a copy duly authenticated being transmitted to England it is proved in the ecclesiastical court; and deposited as if it was an original will. (*Toller*, 70.)

If the deceased was a foreigner, domiciled abroad, and his will is brought into the ecclesiastical court for the purpose of being admitted to probate, the court in deciding whether it is a valid will or not is guided not by the English law, but by the law of the country where the deceased was domiciled. (*Curling v. Thornton*, 2 *Add.* 6, 21.)

Upon this ground, it is said to have been the practice of the prerogative court, upon the production of an exemplification of the probate granted by the proper court, in the country where the deceased died domiciled, for the prerogative court to follow the grant upon the application of the executor, in decreeing its own probate. (*Larpet v. Sindry*, 1 *Hagg.* 382. *In the goods of Crimgan*, *id.* 548.) The same practice is adopted in this state. (*Isham v. Gibbons*, 1 *Bradf.* 75.)

But although the English courts thus admit that the question of the validity of the will of a *foreigner*, domiciled abroad, ought to be determined according to the law of the country where the testator died domiciled, yet they have questioned whether the rule extends to the case of a British subject domiciled in a foreign country. In the case of *Curling v. Thornton*, (*supra*,) Sir John Nicholl expressed his doubts whether a British subject was en-

titled so far "*exuere patriam*" as to select a foreign domicile in complete derogation of his British domicile, and thereby to render his property liable to distribution, even in cases of intestacy, according to any foreign law; still less thereby to make the validity of his will depend on its conformity to that law.

At all events it is clear on British authority, that the mere *residence* of a British subject in a foreign country at the time of making his will and his decease, will not cause its validity to depend on the law of the country where he so resided. (*Curling v. Thornton, supra. Anstruther v. Chalmers*, 2 *Sims*. 1.)

The subject of expatriation, as it is received in this country, is ably reviewed by Chancellor Kent in his 25th lecture. (2 *Kent's Com.* 37 to 73.) The conclusion which he reaches, from an examination of the American adjudications, is, that a citizen cannot renounce his allegiance to the United States, without the permission of the government; and that as there is no existing legislative regulation on the case, the rule of the English common law remains. It follows, therefore, that the practice of the ecclesiastical courts on this subject, so far as it is not altered by our own state, affords the only safe guide in cases of this nature.

The legislature, in 1830, made some further provisions for proving wills, executed by persons out of the state, according to the laws of the country in which they are made, or where the witnesses reside out of the state, by permitting the proof to be taken on a commission issued out of the supreme court. (*Laws of 1830, pp. 388, 399, §§ 63 to 69, as amended by the Constitution of 1846, and subsequent legislation.* (3 *R. S.* 152, 153, 5th ed.) The practice in these cases belongs to that of the supreme court, rather than the surrogate. Suffice it to say, that the will is to be established in the supreme court, and transmitted to the surrogate of the county where the assets of the deceased are. The surrogate is then authorized to issue letters testamentary or of administration with the will annexed on the will so proved; and the like power, also, is conferred upon him where a will has been admitted to probate in a foreign country, upon the production of a duly exemplified or authenticated copy of the will, under the seal of the court in which it shall have been proved. But no will of personal estate, made out of this state, by a person not being a citizen of this

state, can be admitted to probate under the foregoing provisions, unless such will shall have been executed according to the laws of the state or country in which the same was made. This last enactment is in conformity to the English decisions in the cases cited. Under these provisions, the chancellor decided, in the matter of Roberts' will, (8 *Paige*, 446,) that a will of personal property, executed out of this state, by a person domiciled where such will was executed, and who continued to reside there until his death, did not require the attestation of two witnesses as provided by the revised statutes; and that it could not be admitted to probate unless executed according the laws of the state where it was made. (*Id.* 519. *Ex parte McCormick*, 2 *Bradf.* 169.)

The sections we have been considering do not provide for the case of a will executed according to the law of *the testator's domicile*, but not according to the law of the place where it was made. But this omission is, in effect, cured by the 77th section of the act of 1837, p. 537, which authorizes the surrogate to issue a commission to take the testimony of a foreign witness in the same manner as by law the same is done in any court of record. This authority is given on any proceedings or matters in controversy before a surrogate, where the testimony in any other state or territory of the United States, or any foreign place, is required by any party to such proceedings or controversy. It is doubtless applicable to the case of the proof of a will, whether of real or personal property, and will enable the surrogate to dispense with the aid of the supreme court in such cases. (*Isham v. Gibbons*, 1 *Bradf.* 70.)

If a will be in a foreign language the probate is granted of a translation. (*Toller*, 72.)

With a view to preserve the record of all important transactions in the surrogates' courts, it is wisely provided that the testimony taken by the surrogate, in relation to the proof of any written or unwritten will, and in any controversy relating to the granting of letters testamentary or of administration, or the revoking of the same, shall be reduced to writing, and entered by him in a proper book, to be preserved as part of the books of his office: if taken by any county judge or district attorney, the same shall be filed in the office of the clerk of the county. (2 *R. S.* 80, § 57.)

The surrogate is also required to record in his books, to be provided by him, all wills proved before him, and all letters testamentary or of administration, and all letters appointing a collector, with all things concerning the same. The records of such wills and letters, and the transcripts thereof, duly certified by the surrogate having the custody of such records, under his seal of office, is made evidence in all courts, as far as respects any personal estate, in the same manner as if the originals were produced and proved. (*Id.* § 58.)

A copy of the will of persons not inhabitants, admitted to probate, and also a copy of letters testamentary granted upon such will, are required to be transmitted to the secretary of state within ten days after probate, to be filed in his office, the expense of which is paid by the state. (*Id.* 59.)

With respect to the instrument of which probate is necessary, the criterion seems to be, according to the English books, whether *it be testamentary and operates on personal estate*. If such be its character, whatever be its form, it should be admitted to probate in the proper ecclesiastical court, otherwise its existence cannot be recognized in any other court, either of law or equity. (1 *Wms. Ex'rs*, 320, 4th Am. ed.)

If it barely appoint a testamentary guardian, it need not be proved. (*Gilliat v. Gilliat*, 3 *Phill.* 222. 2 *Kent's Com.* 225, lecture 30.)

Where the will respects land alone, and does not dispose of personal property, it is said in the English books, that it ought not to be proved in the spiritual court. (1 *Wms. Ex'rs*, 321.) Nor is it necessary there to have it admitted to probate, to entitle a legatee to recover his legacy out of the real estate. (*Tucker v. Phipps*, 3 *Atk.* 361.)

I am not aware that the precise question has been decided in this state, under the revised statutes. It is believed, however, that all wills in which *an executor is nominated*, whether relating to real or personal estate, should be admitted to probate. This results from various provisions in the revised statutes. Thus, it is provided that an executor, not named in letters testamentary, cannot execute a power to sell real estate. He is superseded.

(*Ogden v. Smith*, 2 *Paige*, 195.) No person, it has been seen, can be an executor *de son tort*; therefore, there is no person to be sued as the representative of the deceased, but his rightful executor, administrator or heir. The rightful executor cannot be sued till letters testamentary have issued to him. Nor can an administrator be appointed while there is an executor competent to act. The creditor must wait until the executor renounces, or until he has been summoned to appear and qualify, and by reason of his default, is declared to have renounced. (2 *R. S.* 70, 71.)

A nuncupative will must be admitted to probate. But this species of will is now limited only to wills made by a soldier while in actual service, or by a mariner while at sea. (2 *R. S.* 60. *Hubbard v. Hubbard*, 4 *Seld.* 196. *S. C.* 12 *Barb.* 148. *Ex parte Thompson*, 4 *Bradf.* 154. *Prince v. Hazleton*, 20 *John.* 502.) The preliminary proceedings to prove it are similar to those in other cases.

SECTION II.

Of the proof and recording of wills of real estate.

The importance of some provision for recording wills of real estate, so that the record or an authenticated copy thereof might be evidence in a contest relative to the estate devised, was felt at an early period, in this state. Thus, by the 9th and following sections of the act of 1786, (1 *Greenleaf*, 239,) for the relief of creditors as against heirs, devisees, executors and administrators, and *for proving wills respecting real estate*; it was enacted that in all cases where any real estate should be devised by any last will or testament, it should be lawful for the *executor, or any other person interested* in such real estate, if they or any of them should think proper, to cause such will to be brought before the court of common pleas of the county where the lands were situated, to be proved. And the court was authorized, if fifteen days' notice of the intention of proving the said will had been given to the heirs of the testator, to cause the witnesses to the will to be examined in open court. The examinations were to be in writing; and if it appeared to the court that such will was

duly executed according to law, and that the person who executed the same was, at the time of executing it, of full age, and of sound mind and memory and not under any restraint, then the said court was required to order and direct the clerk of the court to record such last will and testament, together with the proof thereof so taken in the said court, in a book to be provided by the clerk for that purpose.

If the lands or real estate devised, were situated in several counties, the will was required to be proved in the supreme court and recorded by a clerk of that court. The record of the will was declared to be as good and effectual in all cases, as the original will would be if produced and proved.

The court in which the will was to be proved was clothed with ample power to compel the production of the will, and the attendance of witnesses, on the application of any interested person. But doubts were early entertained whether a will or codicil, when one or more of the witnesses to the same were dead, or did not reside in the state, could be proved and recorded, according to the act. To remove these doubts, an explanatory act was passed in 1790, (2 *Greenl.* 325,) by which it was enacted that when any witness to any will should be examined in any court, according to the former act, and it should appear to the same court that the other witness or witnesses were either dead or did not reside within this state, the court should take, in open court, such proof of the handwriting of the testator, or of the witnesses or witness, so dead or absent, or of such other circumstances as would be proper to prove the same will or codicil upon a trial at law; and should cause all such examinations and proofs to be reduced to writing. And the court was further required, if it should appear that such will or codicil was duly executed according to law, that the testator was, at the time of executing the same, of full age, and of sound mind and memory, and not under any restraint, to direct the clerk of the same court to record the said will and proofs, according to the direction of the said act. The same section also provided for taking the proof of a will when all the witnesses were dead or resided out of the state. The proofs in the latter case were to be such as would be required to prove the will on a trial at law, and were to be reduced to writing and recorded, and to be of the same

force and effect in any controversy relative to said will, as if taken in open court, on such trial, provided it should appear that the lands in question had been uninterruptedly held under the said will for the space of thirty years. The will was required to be deposited with the clerk, who was authorized to give copies of it; but it was not to be recorded unless it appeared on the examination aforesaid, that the lands claimed under it, or some part thereof, had been held under it for thirty years previous thereto.

The foregoing statutes were incorporated into one, and re-enacted in 1801; but the period of thirty years was reduced to twenty. (1 *K. & R.* 178, 179.) And at the revision of the laws in 1813, it was again retained, with no essential alteration; except by the latter act a transcript of the record of such will, certified by the clerk, under the seal of the court in which it was proved, was made as effectual in all cases as the original will would be if produced and proved; and the original will, with a certificate of the clerk of the court, under the seal of the court, of the proof thereof endorsed thereon, was also made evidence without further proof. (1 *R. L. of* 1813, *p.* 364.) Neither of the foregoing statutes made it *necessary* to prove a will, as a will of real estate, in the supreme court, or court of common pleas. It was left entirely optional with the parties interested, and was rarely done, except for the convenience and safety of the devisee.

By the revised statutes of 1830, the power of proving and recording a will of real estate was taken from the supreme court and courts of common pleas and transferred to the surrogates' courts of the proper county. (2 *R. S.* 56.) The surrogates' courts thus acquired exclusive jurisdiction of this matter, except in the case of wills lost or destroyed, or in the case of wills executed according to the law of this state, when the witnesses to the same reside out of the state, or in the case of a will where the original is in the possession of a court or tribunal of justice of another country. In those cases the will might be proved in the court of chancery, and may still be proved in the supreme court. (3 *R. S.* 151, § 79. *Id.* 153, 5th ed.) *Matter of Atkinson*, 2 *Paige*, 214. *In the matter of Easton's will*, 6 *id.* 183. *Bulkley v. Redmon*, 2 *Bradf.* 281.) These exceptions are of rare occurrence; and therefore, for most purposes, the surrogate's court has the exclusive original

jurisdiction in relation to the proving of both wills of real and wills of personal estate.

But the revised statutes contained a provision founded on the presumption in favor of the heirs at law, which makes it necessary for the devisee, as a matter of safety, to record the will under which he derives title. Thus it is enacted (1 *R. S.* 748, 749, § 3; 3 *id.* 38, 5th ed.) that the title of a purchaser in good faith, and for a valuable consideration, from the heirs at law of any person who shall have died seized of real estate, shall not be defeated or impaired by virtue of any devise made by such person of the real estate so purchased, unless the will or codicil containing such devise shall have been duly proved as a will of real estate, and recorded in the office of the surrogate having jurisdiction, or of the register of the court of chancery, when the jurisdiction shall belong to that court, within four years after the death of the testator, except 1. Where the devisee shall have been within the age of twenty-one years, or insane, or imprisoned, or a married woman, or out of the state at the time of the death of such testator; or 2. Where it shall appear that the will or codicil containing such devise shall have been concealed by the heirs of such testator, or some or one of them; in which several cases the limitations contained in this section shall not commence until after the expiration of one year from the time when such disability shall have been removed, or such will or codicil shall have been delivered to the devisee or his representative, or to the proper surrogate.

Hence, it is obvious that if the devisee takes under the will a more beneficial estate than would descend to him as heir, and more especially if the devisee is not an heir of the testator, he should, in general, have the will proved and recorded as a will of real estate, as well to preserve the evidence of his title as to prevent any third person from deriving a right through the heirs at law.

The revised statutes of 1830 treated an application for the proof of a will of real estate, with a view to its being recorded in the surrogate's court, as a different proceeding from an application for probate of a will bequeathing personal estate. In the former case, the jurisdiction attached where any real estate should be devised by will; and in that case it permitted any executor or devisee named in the will, *and any person interested in such estate,*

to cause the will to be proved before the surrogate of the county to whom the probate of the will of the testator would belong in respect to personal property. (2 *R. S.* 57.) But the statute did not say by whom an application should be made for a citation with a view to obtaining probate of a will disposing of personal property. It left that as it existed before, which we have seen belonged to the executor named in the will, or to a legatee. (*Walsh v. Ryan*, 1 *Bradf.* 433.)

Although an executor or devisee, named in the will, might apply to have it recorded as a will of real estate, it is presumed the executor was not a necessary party unless he took some interest as such under the will. The revised statutes also contemplated that a will proved as a will of real estate, should be recorded in a different book from a will admitted to probate only. The proceedings were between different parties, and for different objects. The first process in the one case was a notice; that in the other a citation. And it might happen, that the next of kin in the one case were a different class of persons from the heirs at law in the other, who were the only adverse parties to the proceeding.

If the will can be recorded on the application of an executor who takes no interest under the will, he must, for that purpose, be treated as a trustee for the parties in interest. The law would not permit a collusion between the executor and anybody else to work a prejudice to the real parties in interest.

It was the policy of the legislature, and one of the objects of the act of 1837, (*L. of 1837*, p. 524; 3 *R. S.* 146, 5th ed.,) to assimilate the proceedings to record a will of *real estate* to the proceedings on obtaining *probate* of a will of personal property alone. (*Caw v. Robertson*, 1 *Seld.* 129.) Hence the preliminary steps are the same in both cases. Both are commenced by a citation. If the will relates exclusively to real estate, the surrogate is to ascertain by proper proof, the names and places of residence of the *heirs* of the testator, or that upon diligent inquiry the same cannot be ascertained. He need not, in this case, inquire as to the *widow and next of kin* of the testator, as he must when the will relates solely to the personalty. But if the will relates both to real and personal estate, he is then required to ascertain the names and places of residence of the heirs, widow and next of kin of the testa-

tor, or that upon diligent inquiry the same cannot be found. In other respects the preliminary proceedings are alike in both cases, and have been sufficiently mentioned in the preceding section. The service of the citation and the proofs of service in both cases are alike.

On receiving due proof of the service of the citation upon the proper parties, and in the proper manner, the surrogate is required to cause the witnesses to be examined before him, and the proofs and examinations to be reduced to writing. Two at least of the witnesses to the will, if so many are living in this state, and of sound mind, and are not disabled by age, sickness or infirmity from attending, are required to be produced and examined, and the death, absence, insanity, sickness or other infirmity of any of them must be satisfactorily shown to the surrogate, and he must inquire particularly into the facts and circumstances before establishing the will or granting letters testamentary or of administration thereof.

It is further provided that no written will of real or personal estate, or both, should be deemed proved until the witnesses to the same, residing within this state at the time of such proof, of sound mind and competent to testify, should have been examined pursuant to law, as in the act prescribed; and in all cases the oath of the person who received the will from the testator, if he can be produced, together with the oath of the person presenting the same for probate, stating the circumstances of the execution, the delivery and the possession thereof, may be required; and before recording any will or admitting the same to probate, the surrogate is required to be satisfied of its genuineness and validity. (*L. of 1837, p. 627, § 17. 3 R. S. 149, § 66, 5th ed.*)

Another evidence that the legislature intended, as far as practicable, to assimilate the proceedings in the two cases is derived from the 19th section of the act, which provides that when any will shall be recorded as a will of real estate, it shall not be necessary to record the same as a will of personal estate.

It will be more convenient to collect in the next section the testimony required or admissible in various other aspects of the case. (*See p. 174.*) We are now considering the usual and most fre-

quent cases, where all the subscribing witnesses appear before the surrogate.

If it shall appear upon the proof taken that the will was duly executed, that the testator at the time of executing it was in all respects competent to devise real estate, and not under restraint, the said will and the proofs and examination so taken are required to be recorded in a book to be provided by the surrogate, and the record thereof to be signed and certified by him. (2 R. S. 58, § 14.)

The surrogate is then required to endorse a certificate of such proof on the original will, to sign the same and attest it with his seal of office. The will may then be read in evidence without further proof. The record of the will, made as aforesaid, and the exemplification of such record by the surrogate in whose custody the same may be, is required to be received in evidence, and to be as effectual in all cases as the original will would be if produced and proved, and may in like manner be repelled by contrary proof. (*Id.* § 15.)

Before recording the will and the proofs, an order or decree should be entered in the minutes reciting the proceedings and the proofs briefly, and declaring the valid execution of the will, and directing it, together with the proofs and examinations, to be recorded in the book provided for that purpose. If the surrogate decides against the validity of the will, his decision should in like manner be entered in the minutes.

There is, however, one case where a will of real estate may be proved before the surrogate, and yet not be recorded by him. That is in a case where it shall appear to the satisfaction of the surrogate that all the subscribing witnesses to the will are dead, insane, or reside out of the state. In such a case the surrogate is required to take and receive such proof of the handwriting of the testator, and of either or all of the subscribing witnesses to the will, and of such other facts and circumstances as would be proper to prove the will on a trial at law. (§ 16.) These proofs are to be signed, certified, and recorded by the surrogate, as before provided, and *the will is to be deposited with him.* (§ 17.)

The statute further provides that the record of the proofs and examinations taken in pursuance of the two last sections, and the exemplification of such record by the surrogate in whose custody

it may be, shall be received in evidence upon any trial or controversy concerning the same will, after it shall have been proved on such trial or controversy, that the lands in question therein have been uninterruptedly held under such will for the space of twenty years before the commencement of the suit in which such trial or controversy shall be had; and shall be of the same force and effect, as if taken in open court, upon such trial, or in such controversy. (*Id.* § 18.)

The proceedings, under this branch of the statute, are a convenient mode of perpetuating the testimony relative to the due publication of a will of real estate. They do not, it would seem, operate as notice to a purchaser from the heirs of the person dying seized, because the will is not, and cannot be recorded. The holding of the premises under the will is of itself notice. The will, in this case, cannot be exemplified, nor can a copy be received in evidence, without accounting for the non-production of the original.

The foregoing provision relates only to wills of real estate. There is a corresponding enactment in the act of 1837, p. 528, §§ 20 and 21, in relation to wills of personal estate, and in which if the surrogate is satisfied with the proof, he may grant probate of the will, and record it as a will of personal estate only, and so as to affect only the personal estate of the testator. In this case, the surrogate is to enter in his minutes the decision which he may make concerning the sufficiency of the proof or validity of any will which may be offered for probate; and in case he shall decide against the sufficiency of the proof, or the validity of any such will, he is required, without charge, to state the ground upon which the decision is made, if required by either party. The object of this is to facilitate the re-examination of his decree in case of an appeal by either party. (For forms see Appendix, 5 et seq.)

SECTION III.

Of evidence in testamentary cases.

The New York code of procedure, which has abrogated the rule with respect to the exclusion of witnesses on the ground of interest, and has allowed in certain cases, the parties to be examined as witnesses, does not extend to surrogates' courts. The questions

concerning the competency of witnesses, and the various other matters in relation to testimony, must be decided in surrogates' courts, by the law as it stood before the adoption of the code, except where the practice in this respect has been modified by subsequent legislation. (*Wilcox v. Smith*, 26 Barb. 316.)

In general it may be stated, that the same rules of evidence prevail in surrogates' courts, as governed, before the code, the courts of record in the state, in analogous cases. Some practices which in England formerly prevailed, and which, perhaps, now prevail in the ecclesiastical courts, that full proof required the testimony of at least two witnesses, and that the children of a legatee are incompetent witnesses to support the will, (*Twaites v. Smith*, 1 P. Wms. 10,) are not, and perhaps never were, law in this state.

The nature of the proof in testamentary cases, and the number of witnesses to wills, are regulated by statute. The provisions of the law for proving wills where all the subscribing witnesses are dead, by permitting the surrogate to take such proof of the handwriting of the testator and of either or all of the attesting witnesses to the will, and of such other facts and circumstances as would be proper to prove the will on a trial at law, contain a clear intimation, that the rules of evidence in courts of law are to govern surrogates' courts as well as courts of record.

The revised statutes assume that the rule as to competency and credit of a witness is the same in all our courts. Hence it is provided, that if there be a beneficial devise, legacy, interest or appointment of any real or personal estate to a person who is a subscribing witness to the execution of the will, and the will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void so far only as concerns such witness, or any claiming under him; and such person is made a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made. (2 R. S. 65, § 50.) But the subsequent section saves to the witness such share of the testator's estate as he would have been entitled to in case the will was not established, not exceeding the value of the devise or bequest made to him in the will, and allows him to recover it of the devisees or

legatees named in the will, in proportion to and out of the parts devised and bequeathed to them.

Under this statute it has been decided by the court of appeals, that where there are three subscribing witnesses to the execution of a will, to each of whom a legacy or beneficial interest is given, and the will is satisfactorily proved before the surrogate by the oaths of two of the witnesses, (the probate not being contested, and the third witness not sworn,) such third witness, after the time for appealing from the surrogate's decree establishing the will having expired, is entitled to the legacy given him by the will. (*Caw v. Robertson*, 1 *Seld.* 125, reversing *S. C.* 3 *Barb. S. C. R.* 401.)

A party wishing to object to the competency of a witness before the surrogate, must make the objection in due time, or he will not be permitted to raise it in the appellate court. (*McDonough v. Loughlin*, 20 *Barb.* 238.)

The question has sometimes been agitated, whether a party named in a will as executor can also be a subscribing witness to the will, and be competent to prove it before the surrogate without renouncing the appointment. After renouncing, though he still has the right to retract, he is held to be competent. (*Burrett v. Silliman*, 3 *Kernan*, 93, reversing *S. C.* 16 *Barb.* 199.) The bare naked nomination of an executor in the will, unaccompanied by any beneficial bequest or devise, does not, it seems, disqualify the party so nominated from being a subscribing witness, and competent to establish the execution of the instrument before the surrogate, (*McDonough v. Loughlin*, 20 *Barb.* 238,) although a contrary opinion was expressed with hesitation by the supreme court, in *Burrett v. Silliman*, (*supra.*) which latter case has since been reversed. (*Supra.*)

We have seen, in the preceding section, that two, at least, of the subscribing witnesses to the will, if so many are living in this state, and are not incapacitated from attending, must be produced and examined, and the death or other disability of any of them must be shown to the court, in order to let in secondary evidence. It may, however, happen, as in *Caw v. Robertson*, that there are more than two subscribing witnesses to the will. In such a case, if the will is contested, and the party having the right to contest the same shall, before probate is made, file with the surrogate a

request, in writing, that all the witnesses to such will shall be examined, then all the witnesses to such will, who are living in this state, and of sound mind, and who are not disabled from age, sickness or infirmity, from attending, are required to be produced and examined ; and the death, absence, insanity, sickness, or other infirmity of any of them, shall be satisfactorily shown to the surrogate taking such proof. (*Laws of 1837, p. 526, § 11. 3 R. S. 148, § 57, 5th ed.*)

This section contemplates the production of the witness before the surrogate. But it may well happen that an aged, sick or infirm witness, may be competent to be examined, but unable to attend before the surrogate at a distance from his residence. Provision is made for such a case, where the witness resides in the county of the surrogate, by requiring the surrogate to proceed to the residence of the witness, and there, in the presence of such persons as may choose to attend, proceed to the examination in the same manner, and with the like effect, as though the witness had attended and been examined before the surrogate on the return of the citation. (*Id. § 58.*)

This applies only to cases where the witness resides in the same county with the surrogate. It may well happen that one or more of the aged, sick or infirm witnesses, may reside in another county in this state, and their attendance cannot, probably, be procured before the surrogate. In such a case he may adjourn the proceedings to some future day, and direct the witness to be examined before the surrogate of the county where the witness resides ; and it is made the duty of that surrogate to take the examination and return it, under the seal of his court, to the surrogate making the order. The original surrogate is required to act upon this deposition, and the other testimony in the case, and thus determine on the sufficiency of the proof of such will. The statute makes ample provision for notice to the parties, and authorizes, in effect, the foreign surrogate to attend at the residence of the infirm witness, if he cannot conveniently be brought before him at his office. (*See the sections at large, Laws of 1837, p. 526, §§ 12 to 16. 3 R. S. 148, 149, 5th ed.*)

The foregoing provisions relate only to the *subscribing* witnesses to the will. But it is obvious that in the case of contest relative

to the validity of a will, other aged, sick or infirm witnesses may be wanted by one party or the other, and whose personal attendance cannot be procured. To provide for such cases the act of 1841, (p. 105, 3 R. S. 149, 5th ed.,) applies the foregoing principles to *all witnesses*, whom any person interested in the proof of a will shall request to be examined, whether such witnesses be subscribing witnesses to such will or not ; provided the surrogate who has the power to take the proof of such will is satisfied, that the testimony of the witness so requested to be examined, is material. A subsequent section makes it applicable to all cases of the proof of wills, whether the will be contested or not.

The application to examine a disabled witness cannot probably be made until the return of the citation. No witness can be examined under the act unless the party requesting such examination shall have previously given notice of the time and place appointed for such examination, for such length of time as is required in cases of trials of issues of fact in the supreme court to all the parties who appeared before the surrogate before whom the proceedings to take the proof of any such will are pending. (*Id.* § 65.) The notice should be fourteen days, that being the time prescribed for notices of trial in the supreme court when the act of 1841 was passed. (2 R. S. 410, § 7.)

The foregoing provisions cover all the cases which will usually arise when the witness sought to be examined resides in this state. But it may happen as well in proceedings to prove a will as in other matters in controversy before a surrogate, that the testimony of a witness in some other state or territory of the United States, or in some foreign place, will be required by one or other of the parties. The former statutes did not afford adequate relief in such case. But by the 77th section of the act of 1837, page 537, this is now provided for by empowering the surrogate to issue a commission to take such testimony in the same manner as by law the same may be done in courts of record. *The proceedings in such case are pointed out in the revised statutes.* (2 R. S. 393 et seq. and in books of practice of the supreme court.)

Should the subscribing witnesses, instead of sustaining the will, depose to the testator's incapacity, or should they have forgotten their attestation, the will may nevertheless be proved by other tes-

timony and admitted to probate, and the same principle is applicable to the proof of a will of real estate. (*Bull. N. P.* 264. *Rice v. Outfield*, 2 *Strange*, 1096. *Le Breton v. Fletcher*, 2 *Hagg.* 558. *Jauncy v. Thorn*, 2 *Barb. Ch.* 40. *Nelson v. McGiffert*, 3 *id.* 158. *Dewey v. Dewey*, 1 *Metc.* 349. *Peebles v. Case*, 2 *Bradf.* 226. *Jackson v. Christman*, 4 *Wend.* 277.)

There is no court in which evidence as to testamentary capacity is so frequently agitated as in the courts having original jurisdiction for the proof of wills and in matters of intestacy. In this state that jurisdiction belongs to the surrogates' courts. It is much to be desired that the rules of evidence in all the courts should be the same, when they relate to the like subject matter. And it is believed that when the cases come to be examined, that there is no substantial diversity among them.

The general rule of evidence is undeniable, that witnesses must speak to facts within their knowledge, and that mere opinions are not admissible. (*Culver v. Haslam*, 7 *Barb.* 321. 1 *Greenl. Ev.* § 440. 1 *Phil.* 290.) There are, however, numerous exceptions to the rule, most of which are collected in the authorities referred to. It is the constant practice to receive in evidence the witness' belief of the identity of a person, or that the handwriting in question is or is not that of a particular individual, provided he has any knowledge of the person in the one case, and of the handwriting in the other. On questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called *experts*, may not only testify to facts, but are permitted also to give their *opinions* in evidence.

The important question is not whether there are exceptions to the general rule, but whether the testamentary capacity of a party is the subject of this exception in any possible case.

In *Poole v. Richardson*, (3 *Mass.* 330,) the supreme judicial court held that the *subscribing* witnesses to a will might testify their opinions of the sanity of the testator, but they denied this privilege to other witnesses who, they said, were permitted to speak only to facts. The distinction between the subscribing witnesses to a will, and other witnesses having the same means of knowledge, rests upon no sound principle, and cannot be support-

ed. In *Needham v. Ide*, (5 Pick. 510,) the distinction between the two classes of witnesses was stated to be that the subscribing witnesses being with the testator when he signed the will and required to notice the state of his mind, might lawfully give their opinions, but that the mere opinions of other witnesses were not competent evidence, and were not entitled to any weight, further than they are supported by the facts and circumstances proved on the trial. Surely, if the last witnesses had the same means of knowledge as the first, no reason is perceived why they should be precluded, any more than the subscribing witnesses, from giving their opinion. It is from the intimate knowledge which the subscribing witnesses are supposed to have of the testator, and from the fact that their attention was called to the subject at the time, that their opinions have been held to be competent. Any other witness falling within the same category, is on principle, equally entitled to express his opinion, in connection with the facts disclosed. If there be any difference between them, it is a difference in degree, and not in principle.

In *Culver v. Haslam*, (*supra*.) the supreme court of this state, after recognizing the general rule, that witnesses must only speak to facts, and that mere opinions are inadmissible except in certain cases, decided that on a question of mental capacity of the grantor of a deed, the opinion of an intimate acquaintance, not a medical man, as to the condition of the grantor's mind, was *competent* when connected with facts and circumstances within his knowledge, and disclosed by him in his testimony, as the foundation of his opinion. In remarking upon this species of evidence, the judge who delivered the prevailing opinion said, that apart from the difficulty of restraining a witness from intermingling his opinions with his testimony, in questions of this kind, there were strong reasons why he should be permitted to do so, when he discloses the facts and circumstances, within his own knowledge, upon which they are founded. Human language is imperfect; and it is often impossible to describe in an intelligible manner, the operations of the mind of another. We learn its condition only by its manifestations, and these are indicated not alone by articulate sounds, but by signs, gestures, conduct, the expression of the countenance, and the whole action of the man. It is, therefore, the necessity

of the case, that gives rise to the exception. If the witness could communicate the exact impression of his own mind on the subject, without the opinion, there would be no need of the opinion, and indeed, it would cease to be competent.

The doctrine of the court in *Culver v. Haslam*, was approved by the supreme court in the third district. (*De Witt v. Barley*, 13 Barb. 550.) But this latter case was reversed in the court of appeals. The court thought that the opinions of witnesses, other than those who are specially qualified by scientific knowledge to judge of such matters, are not competent evidence of the soundness of mind of a testator or grantor at the time of executing the deed or will. They took a distinction also between the case of a subscribing witness to a will or deed, holding that it formed an exception to the general rule, and admitting that the opinions of such witnesses were admissible. (*De Witt v. Barley*, 5 Seld. 371.)

The case of *De Witt v. Barley*, (*supra*), went back to another trial, and again reached the court of appeals, on exceptions to the ruling of the circuit judge. It is satisfactorily shown by the learned judge of the court of appeals, in the last case, that the former decision in the same case, reported 5 Seld. (*supra*), was to be considered authoritative only for the doctrine, that upon a trial involving the question of the mental capacity of a testator or grantor, a non-professional witness cannot be asked the broad question whether he considered the party *non compos mentis*, or, which is the same thing, incapable of managing his affairs. In other words, the opinion cannot be called out by questions in such a form as to involve in the answer *matter of law* as well as *matter of fact*. The court considered that upon an issue in regard to the mental imbecility of a grantor, the opinions of witnesses founded upon personal observation of his appearance and conduct might be given in evidence. They treated such cases as belonging to that class of exceptions to the general rule, in which opinions are received *ex necessitate*, for the reason that the minute appearances upon which they depend cannot be so perfectly described as to enable a jury to draw a just conclusion from them. Questions of mental imbecility, they thought, belonged to the same class with questions of identity, of handwriting, of intoxication, and some questions of value; and that in such cases, the witness must state, so far as he is able,

the facts and reasons upon which his conclusion is founded, that the court and jury may have all practicable means for estimating the accuracy of his opinions. (*De Witt v. Barley*, 3 *Smith*, 340; 17 *N. Y. Rep.* 340.) The cases on this subject, on both sides of the question, are elaborately reviewed in the opinions of the court to which reference has been made, and need not be repeated. (See in addition 10 *How. N. Y. Pr. Rep.* 289; *The People v. Eastwood*, 4 *Kern.* 562; 14 *N. Y. Rep.* 562.)

But although the weight of judicial authority in this state is decidedly in favor of the *competency* of opinions as evidence, under the circumstances, and to the extent stated, yet their *effect* upon the mind of the tribunal to which they are addressed, is far from being controlling. They are viewed in a different light from the testimony of a witness to a *fact*. In the latter case, when the witness is unimpeached, the facts sworn to by him uncontradicted, either directly or indirectly, by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court or jury can, in the exercise of a sound discretion, disregard his testimony. (*Newton v. Pope*, 1 *Cowen*, 110. 1 *C. & H. Notes*, 396.) But it is otherwise with regard to *opinions*. These do not control either the court or jury, nor is there any danger that either will be misled by them, when the reasons for them are disclosed. The value and force of the opinion depend on the general intelligence of the witness, the grounds on which it is based, the opportunities he has had for accurate and full observation, and his entire freedom from interest and bias. (*Culver v. Haslam*, *supra*.) They may sometimes be entitled to great weight, and at others to none at all. In many of the cases, both in the English reports and those of New York, the decision of the court in granting or refusing probate, has been in opposition to the opinions of the witnesses, and upon reasons entirely satisfactory. (See remarks of Sir John Nicholl, in *Kinleside v. Harrison*, 2 *Philm.* 449; *Cartwright v. Cartwright*, 1 *id.* 90; *Carroll v. Norton*, 3 *Bradf.* 291; *Stewart's Executor v. Lispenard*, 26 *Wend.* 255; *Clark v. Fisher*, 1 *Paige*, 171.)

We have already, in a preceding part of this work, discussed various questions of testamentary capacity, and thus anticipated many questions which might appropriately be treated in the pres-

ent section. But to avoid repetition, we abstain from a further examination of those cases.

The surrogate, in those counties where he is not furnished with a clerk or assistant, is his own examiner. Like the courts of common law jurisdiction, he has the power to direct the order of proof, and the mode of conducting the examination of witnesses. He should exercise his discretion, in this matter, in such a manner as to advance justice, and consult, at the same time, the rights and convenience of the parties and their witnesses. The witnesses must be examined in open court, their testimony reduced to writing, and subscribed by them. It must be recorded in the proper book. When taken by the county judge or district attorney, in consequence of the incapacity of the surrogate, it is to be filed in the office of the county clerk. (2 *R. S.* 57. 3 *id.* 167, § 75, 5th ed.) Whether the testimony shall be taken by question and answer, rests, it is believed, in the discretion of the surrogate.

Under the constitution of 1777, and before the adoption of the constitution of the United States, a provision was made for costs in the court of admiralty, and for the fees of advocates and proctors in that court. (2 *Greenl.* 255.) But there was no fee bill for the court of probates or surrogates' courts, beyond the fees allowed to those officers for specified services. (*Id.* 257.) Although costs were given by the ecclesiastical courts, in England, in cases of contest, both in original suits and on appeal, that practice was not adopted in this state, (*Shultz v. Pulver*, 3 *Paige*, 185. *Reed v. Vanderheyden*, 5 *Cowen*, 719,) and the court of probates expressly decided that it had no power to award costs. The revised statutes of 1830, (2 *R. S.* 223, § 10,) permitted surrogates' courts, in all cases of contests before them, to award costs to the party in the judgment of the court entitled thereto, to be paid either by the party personally, or out of the estate which should be the subject of controversy. But those statutes did not prescribe a tariff of fees, and it was sometimes doubtful by what rate charges were to be made. The act of 1837, § 70, p. 536, directs these costs to be taxed at the same rate allowed for similar services in the courts of common pleas. It has been decided by the surrogate of New York that the fee bill of the common pleas then

in force, is the one by which these costs are still to be taxed, notwithstanding the court of common pleas has since been abolished. (*Western v. Romaine*, 1 *Bradf.* 37.) (For form of the testimony of witnesses, see Appendix, No. 13 and 14.)

CHAPTER VII.

OF ADMINISTRATION, AND THE APPOINTMENT OF ADMINISTRATORS.

In the former part of this work we have treated of wills, their origin, nature and incidents; of the appointment of executors, of the probate of wills and testaments, and of various matters connected with this department of jurisprudence. We come now to another branch of the exclusive original jurisdiction of surrogates' courts, namely, its jurisdiction over the estates of deceased persons when there is no executor at all, or none capable of acting. A person who makes no testamentary disposition of his personal property is said to die *intestate*. This state of things occasions what is usually denominated a *general intestacy*. It sometimes happens, however, that the deceased, though he makes a will, appoints no executor, or else the appointment wholly or partially fails; in either of which events he is said to die, *quasi intestatus*. (2 *Inst.* 397.) We shall treat of the consequences which follow either of these events.

We do not deem it necessary to give a historical sketch of the origin of administrations in England. The subject, however interesting and instructive, is not indispensable to a correct understanding of the law of this state. It will be found sufficiently at large in the elementary works most familiar to the profession. (2 *Bl. Com.* 494. 1 *Wms. Ex'rs*, 329.) With us, the jurisdiction of surrogates' courts, in cases of intestacy, and the general practice in the appointment of administrators, both general and special, are essentially regulated by the revised statutes, and the subsequent amendments. But it will aid us in the construction of these statutes to take a brief survey of the whole subject of administration as it existed when those statutes took effect.

At common law the subject of administration was divided into

general, special, limited and temporary administrations. First. A *general* administration was where the power of collecting and final disposing of the goods, chattels and credits of the intestate was committed to a person, without any exception or reservation; and without restriction as to the power, or limitation as to the time of continuance of the authority. It is this kind of administration that is usually intended when the subject is mentioned in judicial proceedings or legislative enactments. Secondly. A *special administration* was of two kinds. (1.) Administration *cum testamento annexo*, which usually happened in one of three ways; (1,) where the person appointed executor renounced; (2,) where he died before the testator, or from any cause was incapable of acting; and (3,) where the sole executor died after he had commenced, but before he had completed the administration of the will.

The second species of special administration was termed an administration *de bonis non*. This happened where an administrator, having partly performed his administration, died leaving it unfinished; or when an executor died after commencing, and before completing, the execution of the will. In both these cases, administration of the goods, chattels and credits of the first testator, or intestate, left unadministered, was committed to a party entitled; and in the latter case it was called an administration *cum testamento annexo, de bonis non, &c.* In both cases, the administration was unlimited in duration; and the power granted was co-extensive with the assets left unadministered. Indeed, both a general and special administration terminated only with the life of the grantee, and extended to the whole estate of the deceased.

Third. *Limited administrations* were of two kinds, (1,) such as were confined to a particular extent of time; and (2,) such as were confined to particular *subject matter*. The first class embraced an administration *durante minore etate*. This occurred (1st,) either where an infant was sole executor named in a will, or (2d,) where he was the next of kin entitled to administration on an intestate's estate. In both cases, at common law, administration was committed to his guardian, or to some suitable person, till the infant became of age. In the first case it was a species of administration *cum testamento annexo*. Second, an administration *pendente lite* was granted in case of a controversy in the spiritual court

concerning the right of administration to an intestate. Third. An administration *durante absentia*, and was granted where the executor named in the will, or at common law, where the next of kin was out of the kingdom.

The second class of limited administrations, to wit, such as were confined to a *particular subject matter*, embraced (1st.) an administration *cæterorum*, which occurred where a *feme covert*, under a power, made a will, bequeathing *part* of her property. In this case a limited probate was granted to her executor, restraining his authority to the subject embraced in the power, and an administration of the *other goods* &c. of the wife was granted to the husband. (2d.) This species of administration arose, also, where for any reason the court deemed it for the interest of the parties concerned to limit the authority to a part of the effects.

Fourth. There were a variety of other *temporary* or limited administrations arising from the limitation of the appointment by the testator in his will, or from the happening of circumstances, not embraced in either of the preceding heads. Thus, an executor might be appointed by a testator, with a limitation as to his continuance in office, and a restriction as to his power over the estate. The case *In the goods of Metcalf*, (1 Add. 343,) is a fit illustration under this head. In that case the testator died in England stating a short time before he died, that he left a will in India. A temporary administration was granted till the will could be produced. Here, a *general administration* could not have been granted, because it could not be sworn that he died *intestate*, and the circumstances did not bring it within either of the other subdivisions.

Fifth. In addition to the above the ecclesiastical court of England had the power of granting letters *ad colligendum*, or to appoint a collector in certain cases. (*In the goods of Randall*, 2 Add. 232.) This might be granted to a stranger; and it conferred on him the authority merely of collecting the personal property of the deceased, giving discharges for debts due the intestate or testator, on receiving payment, and doing what might be necessary for the preservation of the property. He had no power to bring suits. And his power in other respects was extremely limited.

Such is a brief epitome of the law on this subject, anterior to the revised statutes, as it was supposed to exist in England and in

this state. The common law was the law here except as modified by legislation. A general knowledge of it is essential to a full comprehension of the changes which have been subsequently made. The common law is still the rule where no other law has intervened to change it. We are now in circumstances to consider the existing state of the law on this subject.

SECTION I.

To the surrogate of which county must application be made for letters of administration, and what may be done by the administrator before the grant.

We have already defined the general jurisdiction of surrogates' courts, (*see ante*, part 1, § 3,) and inserted the section of the statute by which it is conferred. Among his powers, it will be seen, is that of granting letters of administration. But this does not direct the inquirer to the particular surrogate before whom, in a given case, the application should be made. This is pointed out by another statute, which declares that the surrogate of each county shall have sole and exclusive power, within his county, to grant letters of administration of the goods, chattels and credits, of persons dying intestate, in the following cases :

1. Where an intestate, at or immediately previous to his death, was an inhabitant of the county of such surrogate, in whatever place such death may have happened.

2. Where an intestate, not being an inhabitant of this state, shall die in the county of such surrogate, leaving assets therein.

3. Where an intestate, not being an inhabitant of this state, shall die out of the state, leaving assets in the county of such surrogate, and in no other county.

4. Where an intestate, not being an inhabitant of this state, shall die out of the state, not leaving assets therein, but assets of such intestate shall thereafter come into the county of such surrogate. (2 R. S. 73, § 23. 3 *id.* 158, § 23, 5th ed.)

Should a non-inhabitant die out of the state, leaving assets in several counties, or assets of such non-inhabitant should, after his death, come into several counties, the surrogate of either county has jurisdiction to grant letters of administration in such a case ;

but the surrogate who first grants the letters acquires thereby the sole and exclusive jurisdiction over such estate, and is vested with all the powers incidental thereto. (2 R. S. 73, § 24. 3 *id.* 158, 5th ed.)

The foregoing statutory regulations apply only to cases of *intestacy*, and have in view the granting of *general* administration. They embrace nearly all the cases which ordinarily occur. There are some, however, which are not covered by them; but as the statutes, since 1837, do not contain any prohibition to exercise jurisdiction in cases not provided for, it is presumed that the common law remains with respect to such cases. The statute regulates the jurisdiction, as far as it goes, in the particular instances specified. (*Kohler v. Knapp*, 1 Bradf. 241.)

Though, in general, a person entitled to letters of administration, can do no act to bind the estate before they are granted, yet it was held in *Priest v. Watkins*, (2 Hill, 225,) that where a note belonging to the estate of an intestate was paid to his widow, who subsequently united with another in taking out letters of administration, and they then brought an action upon the note in their representative capacity, that the letters related back to the time of the intestate's death, and thus legalized the payment to the widow. (*Rattoon v. Overacker*, 8 Johns. 126, S. P.)

SECTION II.

Of the persons to whom general administration is to be granted in cases of total intestacy, and herein of those who are incapacitated to become such administrators.

It is stated in the English books of authority, that the jurisdiction of the ecclesiastical courts in regard to general administration in the case of a total intestacy, is regulated by the statutes, 31 Edward 3, ch. 11, and 25 Henry 8, ch. 5, § 3. By the former of these statutes, the ordinary was directed "to depute the next and most lawful friends of the deceased person, intestate, to administer his goods," and by the latter, "to grant administration to the widow of the deceased, or to the next of kin, or to both, as by the discretion of the same ordinary should be thought good." The

same statute gives him power, in case several of the same degree of kindred apply for letters, to select either at his discretion. (1 *Wms. Ex'rs*, 336. *Toller*, 83. 2 *Kent*, 409. *And see ante*, Part 1.) The statutes above referred to have doubtless been the basis of the legislation on the subject in this country, and certain civil tribunals have been substituted for the ecclesiastical courts. In this state, the act of Henry 8 was substantially copied in the laws of this state, in force at the time of the revision of 1830. (*See 1 R. L. of 1813*, p. 445, § 5.)

But by the revised statutes it is now enacted that administration, in case of intestacy, shall be granted to the *relatives* of the deceased, *who would be entitled to succeed to his personal estate*, if they or any of them will accept the same, in the following order : First, to the widow ; second, to the children ; third, to the father ; fourth, to the brothers ; fifth, to the sisters ; sixth, to the grandchildren ; seventh, to any other of the next of kin who would be entitled to share in the distribution of the estate. If any of the persons so entitled be minors, administration shall be granted to their guardians ; if none of the said relatives or guardians will accept the same, then to the creditors of the deceased ; and the creditor first applying, if otherwise competent, shall be entitled to a preference ; if no creditor apply, then to any other person or persons legally competent ; but, in the city of New York, the public administrator shall have preference after the next of kin, over creditors and all other persons ; and in the other counties of the state, the county treasurer shall have preference next after creditors, over all other persons. And in case of a married woman, dying intestate, her husband shall be entitled to administration in preference to any other person, as hereinafter provided. (2 *R. S.* 74, § 27.)

Neither of the English statutes referred to mention the husband by name as a person to whom letters of administration should be granted on the death of his wife intestate. He was, nevertheless, entitled, not indeed under those statutes, but by his marital right at the common law. By the marriage, the husband acquires an absolute title to all the personal property of the wife, which she had in possession at the time of the marriage. This property is, at common law, transferred to him by legal operation.

It belongs to him absolutely, without any liability on his part to account for it to her next of kin, if he survives her, or to the creditors of the wife, whose claims have not been enforced during the continuance of the marriage. He acquires also, by the marriage, a title to all the choses in action of the wife, which also become his if reduced to possession, or disposed of by him. But if he dies before reducing them to possession or disposing of them, they will go to the wife if she be living, and if she be dead, they will go to her representatives. (*Reeve's Dom. Rel.* 1 to 4. 2 *Kent's Com.* 145.) This doctrine, in some cases, worked great hardship to the creditors of the wife whose debts were not enforced during her lifetime, against the husband. In such a case, however great the fortune received by the husband on account of the marriage, he ceased, at her death, from being liable for her debts. (*Id.*)

The New York statute, it has been seen, expressly gives the preference to the husband over any other person claiming a right to administer on the estate of his deceased wife. It requires him to give bonds, like other persons, and makes him liable as administrator, for the debts of his wife, only to the extent of the assets received. If he omits to administer he is presumed to have assets in his hands sufficient to satisfy her debts, and is made liable therefor. If he dies, leaving assets of his wife unadministered, those assets pass to his executors or administrators, as part of his personal estate, but are made liable for her debts to her creditors, in preference to the creditors of the husband. Should it happen that letters of administration on the estate of the deceased wife be granted to any other person than her husband, by reason of his neglect, refusal or incompetency to take the same, such administrator is required to account for and pay over the assets remaining in his hands, after the payment of debts, to the husband or his personal representatives. (2 *R. S.* 75, §§ 29, 30. *Shumway v. Cooper*, 16 *Barb.* 556. *McCosker v. Golden*, 1 *Bradf.* 64, 67. *Lockwood v. Stockholm*, 11 *Paige*, 92. *Renwick v. Renwick*, 10 *id.* 419, 420.)

Nor is this right of the husband affected by the acts of 1848 and 1849, for the more effectual protection of the property of married women. (*L. of 1848*, p. 200. *Id. of 1849*, p. 528. 3 *R. S.* 240, 5th ed.) The act of 1849 authorizes a married

female to *take, hold, convey and devise* certain real or personal property in the same manner and with the like effect as if she were unmarried. Both the statutes are silent as to the consequences of her death, without having made any disposition of the property. It follows that the marital rights of the husband, in such cases, are not abridged, but remain as before the statutes in question were passed. (*McCosker v. Golden, supra. Shumway v. Cooper, supra.*) If, therefore, the wife dies intestate, the husband is entitled to letters of administration of her estate, in the same manner as before the enactment of those laws.

At common law, though a marriage be voidable, by reason of some canonical disability, yet the husband was entitled to the administration of the wife's effects, unless sentence of nullity was declared before his death. (*Elliott v. Gurr, 2 Phill. 16.*) But where the marriage was absolutely *void, ab initio*, the husband was not entitled to take administration; but it belonged to the next of kin of the wife. (*Browning v. Reane, 2 Phill. 69.*) The consequences which result from a divorce for adultery, are regulated in this state by statute. (2 *R. S.* 146, § 46.) If the wife be the complainant and the decree dissolving the marriage be pronounced against the husband, he being the guilty party, all her estate, real and personal, is reserved to her as her sole and absolute property. This embraces not only the real estate which she owned in her own right, but such goods, or things in action, which were left with her by her husband, acquired by her own industry, given to her by devise or otherwise, or to which she might be entitled by the decease of any relative intestate. The husband's life interest as tenant by the curtesy initiate is thus discharged, and it would seem by necessary inference that his right to administer on her estate, should she die after such divorce. (*Renwick v. Renwick, 10 Paige, 420.*) By the terms of the statute, she is entitled to marry again, and consequently, the second or subsequent husband is entitled to administer on her estate, if he survives her.

The husband's right to administer on the estate of his wife, may be barred by his agreement, empowering her to make a general will, disposing of her whole estate, provided she exercises the right conferred on her by the power. (*Rex v. Bettesworth, 2 Strange,*

1111.) If, however, she is authorized only to dispose of part by will, a limited probate is granted to her executor, and a *cæterorum* administration to the husband of the residue.

Where the husband and wife were drowned by the same accident, the prerogative court held that the presumption was that both died at the same time. There being nothing to show that the husband survived the wife, administration was granted of her estate to her next of kin, instead of the next of kin of the husband. (*Satterthwaite v. Powell*, 1 *Curteis*, 705.)

In case of the death of the husband intestate, we have seen that by our statute, the widow, if not in other respects disqualified, is entitled to the preference in respect to the granting of administration on his estate. In general this claim will not often give rise to any dispute as to her title to the grant. The term *widow* implies that she has once been the lawful wife of the husband whose estate she claims to administer. Her application may be opposed by other parties having an interest, or by the public administrator, on the ground that she had never been the wife of the deceased.

As to what shall be sufficient proof of a marriage in such a case, it has been held by the surrogate of New York, that where the claimant and the intestate had lived together as man and wife for four years, and had had three children; where there was open profession of the marital relation, general reputation, and reception amongst their associates, intimates and relatives, as husband and wife, that notwithstanding there had been no ceremonial marriage, those facts raised a presumption of a marriage in fact. (*Grotgen v. Grotgen*, 3 *Bradf.* 373.)

In that case the surrogate observed that if the parties choose to marry by private agreement without the interposition of a magistrate or christian minister, the law does not forbid it. The absence of a ceremony does not invalidate the contract. Its existence may be established by the kind of proof applicable to all contracts.

In the celebrated case of *Cunningham v. Burdell*, (4 *Bradf.* 343,) the whole doctrine on this subject was most thoroughly examined by the learned surrogate of New York. In that case the claimant pretending to be the widow of Dr. Harvey Burdell, who was murdered in the house occupied by her as his tenant, applied

for letters of administration on his estate. This was opposed by the next of kin of the deceased, on the ground that no marriage had in fact been celebrated between the parties, and that no fact in relation to their intercourse had been disclosed from which a marriage could be presumed. The surrogate conceded that by the law of this state marriage is treated as a civil contract, not requiring legal forms, religious solemnities, or any special mode of proof. But he thought that where, as in that case, the pretended marriage contract was concealed by both the parties, where there had been no cohabitation, acknowledgment, or mark of the relationship, but the parties had lived as single persons, and the pretended contract was first announced after the alleged husband's death, that the presumption, instead of being in favor of marriage, was against it, and he accordingly denied the grant of administration to the claimant as widow, but awarded it to the next of kin. (*See also Tummally v. Tummally*, 3 *Bradf.* 369.)

With regard to the effect which a *divorce*, or separation *a mensa et thoro*, under the New York statute relative to divorces, has upon the rights of the widow to administration of the estate of her deceased husband, it is believed that it depends upon the cause of the divorce or separation, and who was the guilty party. On the divorce of the wife for adultery committed by her, she forfeits her right to dower in the real estate of her husband, and to a distributive share of his personalty. (2 *R. S.* 146, § 48.) As the right to administration follows the right of property, according to our statute, it follows that she forfeits also the right of administration upon the estate of the divorced husband, should she survive him. But if the divorce be for the adultery of the husband, or the separation *a mensa et thoro* be for the misconduct of the husband, the wife being the innocent and he the guilty party, a different consequence follows. It is contrary to the analogy of the law in other cases, to permit the crime of one party to work a forfeiture of the rights of another. The statute does not annul the marriage *ab initio*, in either case, nor does it permit the guilty party to marry again during the lifetime of the complainant. The divorce is prospective in its operation, and has no other effect on the marriage relation than such as is declared by the statute. Hence it follows, that on such divorce or separation, decreed by the court on

the application of the wife, for the misconduct of the husband, she is entitled, in case he subsequently dies intestate, and she survives him, to dower in his real estate, and to a distributive share of his personalty, and consequently to letters of administration on his estate. (*Wait v. Wait*, 4 Comst. 95, *overruling same case in* 4 Barb. 192, *and the dictum of V. C. McCoun, in Day v. West*, 2 Edw. 596; *and to the same effect see Burr v. Burr*, 10 Paige, 25, 6, *per Willard, V. C.; opinion of the Chancellor, id.* 31 to 39, *affirming decree of V. C.; S. C. 7 Hill*, 207, *affirming both decrees by court of errors*.) By parity of reasoning, should the divorce be granted to the husband for the misconduct of the wife, the marital rights of the husband, in case of his surviving his wife, would be unaffected by the decree, and he would be entitled to administration on her estate.

But, it is believed, a different rule would prevail should the marriage be annulled under the second article of Title 1, Part 2, chapter 8. (2 R. S. 142. 3 *id.* 233, 5th ed.) The ground on which such decree is based, is for some defect that renders the contract void from the beginning. After a sentence of nullity, decreed by the proper court, neither party could claim to administer on the estate of the other, as a surviving husband or wife. This is according to the English doctrine in the cases which have been cited, (*supra*), and it is founded in wisdom and justice.

Having thus briefly considered the case of the *husband* and of the *widow*, it remains, in the next place, that we should inquire into the rights of the *next of kin*. The statute clearly contemplates that the next of kin, who are entitled to claim the grant of administration, must be *those relatives of the deceased who would be entitled to succeed to his personal estate*. Those persons are described in the statute of distributions. (2 R. S. 96, § 75. 3 *id.* 183, § 82, 5th ed.)

When called upon to ascertain who are the heirs of the deceased, with a view to cite them to attend the proof of his will of real estate, in order that it may be recorded, we look to the statute of descents to ascertain the persons the law denominates *heirs*. 1 R. S. 750. 3 *id.* 40, 5th ed.) It is those persons alone who have an interest in defeating the will, if it makes a different disposition of the estate than the law would give to them in cases of intestacy.

In analogy to this principle, on an application for administration by the next of kin, under our statute, we are to look for the persons who sustain that relation, *at the time of the testator's death*, as well as those who would be entitled to a distributive share of the estate. Both circumstances should concur in order to give the right to administration. (*Savage v. Blythe*, 2 Hagg. App. 150. *Almes v. Almes*, *id.* 155, 156. *The Public Administrator v. Peters*, 1 Bradf. 102.) Hence, a party who has become entitled to a distributive share of the estate by reason of the death of another who was a next of kin to the intestate at the time of his death, is not entitled as against the next of kin, who has an interest.

Consanguinity is defined to be the connection or relation of persons descended from a common ancestor. It is either *lineal* or *collateral*.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from another, as between the father, grandfather, great grandfather, and so upwards, in the direct ascending line; or between the father and his son, grandson, great grandson, and so downwards, in the direct descending line. Every generation in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards.

Collateral kindred answer to the same description. Collateral relations agreeing with the *lineal* in this; that they descend from the same stock, or ancestor; but, differing in this, that they do not descend one from the other. Collateral kinsmen are such then, as lineally spring from one and the same ancestor, who is the *stirps* or root, the *stipes*, trunk or common stock from whom these relations are branched out. (2 Bl. Com. 203, 204. 1 Wms. Ex'rs, 344. *Sweezy v. Willis*, 1 Bradf. 498.)

The mode of calculating the degrees in the collateral line, for the purpose of ascertaining who are the next of kin, so as to be entitled to administration at common law, conforms, it has been said, to that of the civil law, and is as follows; to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; or in other words, to take the sum of

the degrees in both lines to the common ancestor. (2 *Bl. Com.* 207.)

According to the common law, the mode of computation is to begin at the common ancestor and reckon downwards, and in whatever degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. It is obvious that the degrees by this calculation are fewer than by the mode of the civilians. (*Id.*)

The spiritual courts adopted the rule of the civilians in reckoning propinquity of degrees, and in so doing place grandfathers a degree nearer the intestate than uncles and aunts. (*Sweezey v. Willis*, 1 *Bradf.* 498, and the cases cited.) Though the statute of distributions has altered, in several particulars, the mode of distribution consequent upon the computation of the civil law, yet wherever it directs distribution to "the next of kin," the rule of the civil law still prevails. (*Sweezey v. Willis*, *supra.* 1 *Wms. Ex'rs*, 344. *Bogert v. Furman*, 10 *Paige*, 496. 2 *Kent's Com.* 411.)

It was the policy of the legislature in introducing the change of phrasology in the section prescribing to whom administration should be granted in cases of intestacy, to limit the discretion of the probate court in the selection, and to adopt as far as practicable, fixed rules. Hence, certain kindred are mentioned by name, after the widow, instead of the general expression "next of kin," in the former law and in the English statute. Of these, the children standing nearer to the intestate, both in degree and in affection, are the first objects of regard. If there be no widow, or if she renounce, or be disqualified, then the grant of administration is to be made to the *children* of the intestate. The intestate may have left a numerous family, some males and some females; some of full age and some infants; some females married and some single; some the offspring of one mother, and some of another; and one or more not an inhabitant of this state. If the statute had prescribed no rule for the selection in such a case, it would have devolved on the court to make the choice if the parties could not agree. But the statute has wisely provided for all these cases.

Thus where there are several persons of the same degree of kindred

to the intestate entitled to administration, males are to be preferred to females, and unmarried women to such as are married. But where there are several equally entitled, the surrogate is permitted to exercise his discretion, and to grant letters to one or more of such persons. (2 *R. S.* 74, § 28.)

If any be minors, administration may be granted to their guardian.

If there be no children of the intestate, the father is entitled before brothers or sisters; and if there be no father or children, brothers are to be selected before sisters, and in both instances and in all other cases, relatives of the whole blood are to be preferred to those of the half blood.

In addition to the foregoing limitation upon the discretion of the surrogate, there are certain persons to whom he is forbidden to make the grant. He is not to grant it to a person convicted of an infamous crime, nor to a person incapable by law of making a contract, nor to a person not a citizen of the United States, unless he resides within this state, nor to a person under the age of twenty-one years; nor to a person adjudged by the surrogate to be incompetent to execute the duties of such trust by reason of drunkenness, improvidence or want of understanding; nor to a married woman, but in the latter case it may be granted to her husband in her right. (2 *R. S.* 75, § 32, *as amended in 1830.* 3 *R. S.* 159, § 32, 5th ed.)

But the surrogate has no discretion to exclude a person declared by the statute to be entitled to a preference, except for some cause specified in the statute. No degree of legal or moral guilt or delinquency is sufficient for this purpose, unless such person has been actually *convicted* of an infamous crime. It has been held that the conviction here intended is upon an indictment or other criminal proceeding. (*Coope v. Lloverre*, 1 *Barb. Ch.* 45.) Nor can he be excluded on the ground of *improvidence*, unless the evidence tends to show that the party cannot be safely entrusted with the management and preservation of the trust property. (*Id.*) But the fact that a man is a professional gambler, is presumptive evidence of such improvidence as to render him incompetent to discharge the duties of executor or administrator. (*McMahon v. Harrison*, 2 *Seld.* 443.)

The different parts of the statute must be so construed as to harmonize with each other. It is quite obvious that a relative of the intestate, who has no interest or title to a distributive share of his estate, can have no claim to letters of administration. The order of preference established by the statute must be understood as applying only to the relatives who would be intitled to succeed to the personal estate of the intestate. (*The Public Administrator v. Peters*, 1 *Bradf.* 100.) Though the section gives in terms a preference to the father, brothers and sisters before grandchildren, yet the preference cannot be allowed when the former have no interest; and they have none under the statute of distributions if there be grandchildren. (*Id.*)

The order of preference prescribed by the statute can only be interrupted by some cause mentioned in the statute. Indebtedness to the estate does not render a person incompetent to administer, nor impair his priority of right to administration. (*Churchill v. Prescott*, 2 *Bradf.* 304.)

There are still, under our statutes, some cases where the surrogate will be called upon to exercise his discretion in selecting between two or more claimants being equally entitled under the statute. The discretion with which he is invested was not given for his benefit, but for the good of others. It should be exercised with a wise and provident regard to the interest of those who have claims upon the estate, either as creditors or parties in distribution. There is no impropriety in consulting the views of the majority in interest and following their wishes. (*Budd v. Silver*, 2 *Phill.* 115. *Warwick v. Greville*, 1 *id.* 123.) Primogeniture gives no right, but still, other things being equal, the selection of the eldest brother would in general meet the wishes of the family.

It is scarcely necessary to add, that a sole administration is generally preferred over a joint administration. It is less expensive to the parties, more convenient for the claimants, whether creditors or distributees, and more expeditious in its movements. (*Earl of Warwick v. Greville*, *supra.*) So also, a man of business capacity will be preferred, if he possesses the other requisite qualifications. (*Williams v. Wilkins*, 2 *Phill.* 100.)

We have seen that if none of the relatives or guardians will accept the trust of administering, then the grant may be made to the creditors of the deceased, and the creditor first applying, if otherwise competent, is entitled to a preference; if no creditor apply then the grant may be made to any other person or persons legally competent; but in the city of New-York, the public administrator has preference after next of kin, over creditors and all other persons; and in the other counties of the state, the county treasurer has preference next after creditors over all other persons. (2 R. S. 74, § 27.) In England, it is said that the court will, on the petition of other creditors, compel the one selected to enter into articles, to pay debts of equal degree in equal proportions, without any preference of his own. (*Toller*, 106.) Whether this practice ever obtained in this state or not, there is no longer any reason for it, since the right of an administrator to retain for his own debt, has ceased to exist, and the statute has provided for an equality of distribution of the intestates effects among the creditors of the same class. (2 R. S. 88, § 33. *Id.* 77, § 27. *Treat v. Fortune*, 2 *Bradf.* 116.)

When a creditor administrator has been duly appointed, the next of kin cannot during his lifetime, take the administration from him; but upon his death they may come in and claim administration *de bonis non*, provided they apply within a reasonable time. (*Skeffington v. White*, 1 *Hagg.* 699.) In England, it is said a creditor cannot before administration, deny an interest or oppose a will; yet when he has obtained administration he has a right to maintain it against the executor or the next of kin, and it is not to be revoked on mere suggestion. (*Elme v. De Costa*, 1 *Phill.* 173.) In this state, however, a creditor, as well as any other person interested in the estate, may object to the grant of letters testamentary to an incompetent person, or to one whose circumstances are such as not to afford adequate security to the creditors, legatees and relatives of the deceased. (2 R. S. 69, § 2. *Id.* 70, § 6. 3 R. S. 154, 155, 5th ed.) And where administration has been granted to a creditor, and a will is afterwards produced, he is entitled to contest it in the same manner that the next of kin might have done, without being subject to costs. (1 *Phill. R.* 155, 166.)

If none of the relatives or next of kin entitled to share in the distribution of the estate, or the creditors, or the public administrator, will take out letters, the surrogate may grant them to any other person or persons legally competent. In such a case, the question of interest is not regarded. In a case where the brother and only next of kin renounced, the court granted the administration to the nephew, although he had no interest. (*In the goods of Mary Keane*, 1 *Hagg.* 692. 2 *id.* 82.) Or, it has been said, the ordinary may, *ex officio*, grant to a stranger letters *ad colligendum bona defuncti*, to gather up the goods of the deceased; or may himself take the goods of the deceased into his own hands, to pay the debts of the deceased, in such order as an executor or administrator ought to pay them; but he, or the stranger who has letters *ad colligendum*, cannot sell them without making themselves executors of their own wrong. (*Toller*, 107. *In the goods of Mary Randall*, 2 *Add.* 232.)

The general power of the surrogate in relation to cases not within the statutes of administration, is, in some respects restrained in this state, by legislative provisions. Thus, the law authorizing the appointment in the city of New York, of a public administrator, and that conferring similar powers on the county treasurer, abridge the jurisdiction of the surrogate in this respect. (2 *R. S.* 113. *Id.* 117. 3 *id.* 205, 215, 5th ed.) They provide for various contingencies, and are wisely framed to protect the property of persons dying intestate within our jurisdiction when they have no relative to claim administration. In the cases provided for by the statutes, intestacy is presumed until a will is produced and letters testamentary issued thereon. The duties of those officers are fully pointed out in the statutes referred to.

With regard to cases not within the aforesaid statutes, the surrogate has the undoubted right, if neither a relative or a creditor applies, to grant letters of administration to any competent person, at his discretion. It is presumed, however, that the power claimed in England for the ordinary, of taking the goods of the deceased into his own hands, under certain circumstances, does not belong to the surrogates in this state, and probably not to the tribunals in other states, having jurisdiction in testamentary

matters. These courts act only through the persons to whom they delegate the authority conferred on them by the statute or the common law.

SECTION III.

Of the practice of the court, its mode of proceeding in granting letters of administration, and of their form.

The mode of proceeding to obtain letters of administration varies in four different cases. First. If the applicant is the person entitled to administration, as where the widow applies for letters on the estate of her deceased husband, the application is made to the surrogate, by petition in writing, setting forth the facts which confer jurisdiction on the court, and showing the prior right of the applicant. The surrogate is required in all cases, before any letters can be granted on the estate of an intestate, to have proof of the fact of such dying intestate; and he is authorized therefore, to examine the person applying for such letters, on oath, touching the time, place and manner of the death, and whether or not the party dying left any will; and he may examine any other person or persons on that subject, and compel their attendance by subpœna. (2 R. S. 74, § 26.) Usually, however, the petition states the fact of such death, the place of residence of the deceased at the time of his death, the manner of his death, and that no will, after a search amongst his papers, or as the case may be, has been found or discovered, and that the applicant believes that he died intestate; the names and place of abode of his kindred, whether any and which of them are infants, and if so, about how old, and whether they have guardians or not, and if so, the name and place of abode of such guardian, and the probable value of the personal estate of the deceased. The petition should be verified by affidavit, and is, in general, a satisfactory compliance with the statute. (*Sheldon v. Wright*, 2 Seld. 497.) But it does not preclude the surrogate from requiring an oral examination of witnesses on the various points deemed material. (For form of petition see Appendix, No. 38.)

If the facts disclosed by the petition show that the surrogate has jurisdiction of the case, and that the applicant is entitled to

letters, as the person preferred by the statute, an order is entered in the minute book for the letters to issue, on the applicant's entering into the requisite bond, and taking the oath prescribed by law. (2 *R. S.* 77, §§ 41, 42. 3 *id.* 161, 5th ed.) The oath is to be taken before the surrogate, or in case of sickness or other inability to attend, before any officer authorized to administer oaths, that he will well, honestly and faithfully discharge the duty of administrator according to law. (Appendix, Nos. 39, 40, 41, 42.)

The bond is to the people of the state of New York, with two or more competent sureties, to be approved by the surrogate, to be jointly and severally bound. The penalty must be not less than twice the value of the personal estate of which the intestate died possessed, which value is to be ascertained by the oath of the applicant and of such other persons as the surrogate shall think proper to examine. It must be conditioned that such administrator shall faithfully execute the trust reposed in him, and also that he shall obey all orders of such surrogate, touching the administration of the estate committed to him.

By the law of 1851, p. 332, (3 *R. S.* 368, 5th ed.) the bond must be proved or acknowledged in the manner deeds are required to be proved or acknowledged, before it shall be received by the surrogate. (Appendix, No 40.)

On producing the bond and oath of office, if the sureties are deemed sufficient, and the bond is drawn and proved, or acknowledged, in conformity to the statute, they are filed by the surrogate, and an order is thereupon entered in the minutes for letters of administration forthwith to issue. The appointment is then made out under the seal of the court, and recorded in the proper book. It is provided that letters of administration shall run in the name of the people, and be tested in the name of the surrogate, or other officer granting them. When issued by the county judge or district attorney, as they may be in certain cases, the seal of the county court is affixed. (3 *R. S.* 167, § 73, 5th ed. 2 *R. S.* 80, § 55.) (For form of letters and orders see Appendix, No. 43, &c.)

Second. In case the applicant is not the person on whom the right of administration is cast, although of kin, and is desirous of

avoiding the delay and expense of a citation, as where the son of the intestate applies—his mother, the widow, being alive and competent—he must, in addition to the other preliminary proof, produce and prove the renunciation of those having prior right. (2 R. S. 76, § 35.) No citation is in such case necessary. (*Peters v. The Public Administrator*, 1 Bradf. 200.)

A renunciation is a written declination of the right to administer on the estate of the intestate, and is required to be subscribed by the party making it. The practice is, on proving and filing it, to enter an order in the minutes that it be received. A renunciation has no effect on the right of the party to his distributive share of the effects of the intestate. Indeed, it may be retracted after the death of the person to whom the administration was committed. (*Toller*, 95 and 45.) It enures only to the benefit of the party in whose favor it is made. In all other respects the proceedings are the same as under the last head. (See Appendix, No. 50, for form of renunciation.)

Thirdly. In case the person applying for letters is not entitled thereto as of course, and does not produce the renunciation of those having prior right, a citation must be issued to all persons having such prior right, to show cause, at a day and place therein to be appointed, why administration should not be granted to such applicant. (2 R. S. 76, § 35.) (Appendix for form, No. 46.)

Before this citation can be issued proof should be taken, by the oath of some person, of all the facts necessary to authorize the grant of administration. These are, the death, residence, intestacy and kindred of the deceased, the grounds on which the applicant found his claim, as creditor, or entitled to a distributive share of the estate, and the probable value of the assets to be administered. These facts are usually embodied in a written petition, as in the first case, which should be duly verified, and will, in general, be all that the surrogate will require. It should contain, in conclusion, the prayer for a citation to be directed to the proper parties.

The citation should run in the name of the people of the state of New York, be tested in the name of the surrogate or other officer, by whom it is issued, under the seal of the court, and cite and require those to whom it is addressed to appear before the surro-

gate at a time and place therein mentioned, to show cause why administration of the intestate's estate should not be committed to the applicant. It should be addressed to the persons having prior right by name, if their names be known, and if not, that fact should be stated, and such designation be given as would be likely to bring the nature of the application to their notice. (*Burn's Ec. Law, tit. Citation.*) In the citation required to be issued preparatory to the proof of a will of real or personal estate, the names and places of residence of the persons to whom it is addressed are required to be stated, as well as that of the guardians of such as are minors. (*See ante, p. 153, and 3 R. S. 147, 5th ed.*) Although the statute is not as explicit in relation to a citation to the parties having prior right, on an application for letters of administration, no reason is perceived why it should not be equally specific.

The mode of service of the citation varies according to the residence of the persons to whom it is addressed. If they all reside in the county of the surrogate, it must be served personally, or by leaving a copy at the residence of the party, at least six days before the return day mentioned in it. (2) If any of the parties live out of the county, but in the state, and such residence can be ascertained, it must be served personally, or by leaving a copy, at the residence of the party, at least forty days before the return day. (3) If any live out of the state, a personal service of forty days will be sufficient. In the latter case, leaving a copy will not suffice. (4) If the residence of the party is unknown, or is out of the state, a publication of the citation once a week for six weeks, in the state paper, is a sufficient service. (2 *R. S.* 76, § 36.) Thus, it appears, that as to those out of the state two modes of service are allowed: personal service, and a six weeks' publication in the state paper, at the option of the applicant.

With regard to the appointment of guardian ad litem for infants, the same practice should be pursued as on the application to admit a will for probate, or to have it recorded as a will of real estate. (*See ante, p. 157.*) If the infant has a general guardian, the citation should be served on him, he being entitled to administer in right of his ward; and if any of the next of kin are married women, the service should be on their husbands.

On the return of the citation, the applicant appears before the surrogate either in person or by attorney, and exhibits proof of the due service of the citation. If this shows a compliance with the statute, and there is no opposition, an order is entered for the issuing of letters of administration to the applicant on his entering into the requisite bond and taking the oath prescribed by law. The subsequent proceedings are the same as under the first head.

The grounds of opposition to the grant of administration are various. Issue may be taken on the material averments in the petition. The fact of the death, or the intestacy, may be controverted. Or it may be shown that the party applying for letters of administration is not entitled, by reason that some other party who has not renounced, has a prior right; or that he labors under some or one of the disqualifications mentioned in the statute. (2 R. S. 75, § 32.) Although it was held by the Court of Appeals, in *Emerson v. Bowers*, (4 Kern. 449,) that the surrogate could not supersede letters testamentary which had been issued to an executor, on proof that he was *illiterate*, when the charge against him was *improvidence*, it is believed that he may withhold the appointment of an administrator, on proof that he is too ignorant to discharge the duties of the office. There is, in the nature of things, a difference between *removing* an executor nominated by the testator and withholding an appointment from a particular individual, with respect to whom the surrogate has the power of selection. On this subject no definite rule can be laid down. The *want of understanding* mentioned in the statute as a ground of exclusion, does not mean solely such mental incapacity as would disable a party from making a will or a contract, but, in the connection in which it stands, evidently implies not only such incapacity, but also ignorance and dullness of apprehension falling short of a total incompetency. In cases of this kind, and especially where the objections are not such as are specifically enumerated in the statute, the surrogate must consult the interest of the estate, as well as the rights of the applicant. It is said that administration ought not to be committed to a party who is very poor, or in distressed circumstances, especially if the estate is of considerable value. (*Toller*, 102.)

Fourthly. In case the applicant is *guardian*, or a *husband* of the party entitled, the petition must set forth, in addition to the facts required under preceding heads, the relation he bears to the intestate and the party entitled to the grant. The prayer of the petition should in such case also state in what right, either as guardian or husband, he asks the appointment. In other respects the practice is the same as in other cases.

It is proper here to observe that in all cases of application for administration on the estate of an intestate a citation must be issued to, and served on, the attorney general of the state, at least twenty days before its return, unless it appears, by the affidavit of the applicant or other written proof, that the intestate left kindred entitled to his estate, specifying the names of such kindred and their places of residence, as far as the same can be ascertained. (2 R. S. 76, § 37.)

It is said to be the practice in England not to issue letters of administration until after the expiration of fourteen days from the death of the intestate, unless for special cause, (as that the goods would otherwise perish, or the like,) the judge shall see fit to decree them sooner. (1 *Ought.* 323, 324. *Toller*, 96. 2 *Burn's Ec. Law*, quarto ed. title *Wills, Administration*, 640. 1 *Wms. Ex'rs*, 371.) In this state, when the grant is applied for by a party *prima facie* entitled to it under the statute, as having the prior right, or with the renunciation of such antecedent party in his favor, or upon the return of a citation duly served, upon all the prior parties specifically mentioned in the section, there is no reason for the delay, nor does that practice prevail. But should a case occur where none of the parties *enumerated* in the 27th section appear to claim the grant, and the application is made by a stranger as a person legally competent, it is believed that the surrogate would act most discreetly, who should withhold the grant for at least the time mentioned, to see whether some person having a better right would not appear. Such a case would rest upon the common law, and not upon the statute.

CHAPTER VIII.

OF SPECIAL, LIMITED AND TEMPORARY ADMINISTRATIONS,
AND COLLECTOR.

SECTION I.

Of administration cum testamento annexo.

We gave a general summary in the introduction to the preceding chapter, of the various kinds of administration existing at common law and under our statutes in this state, previous to the adoption of the revised statutes. We pointed out the difference between a general administration, in cases of intestacy, and various other grants of administration, whether special, limited or temporary. And we treated in that chapter, of general administration; of the courts having jurisdiction in such cases; of the persons to whom the grant should be made, and therein of the disqualification and incapacity of certain parties; and we noticed briefly the practice of the court on applications for the grant.

We propose, in the present chapter, to notice more at large the cases of special, limited and temporary administration, as they now exist in this state. And to point out some of the diversities between our present practice and that which formerly prevailed.

Many of the cases in the present chapter, were not considered in England as falling within the statute of administrations, (21 *Henry 8, ch. 5*.) which provided only for cases of intestacy, and the refusal of the appointed executor. In such instances the spiritual courts were left to the exercise of their own discretion in the choice of administrator, according to their own practice; and no person had such a legal right to preference that it could be enforced by the common law courts. (1 *Wms. Ex'rs*, 381. *Rex v. Bettesworth*, 2 *Str.* 956. *In the goods of Southmead*, 3 *Curteis*, 28.) We showed that our former statute was substantially copied from the act of Henry 8, and consequently that the English practice and our own were much alike. (1 *R. L.* 444.) Under the English practice, in cases where the grant of administration was not within the statute, the rule was to treat the claimants having

the greatest interest in the effects of the deceased, as *prima facie* entitled ; unless there were some special or peculiar circumstances which required a different disposition of the matter. (*Wetdrill v. Wright*, 2 *Phill.* 248. *Tucker v. Westgarth*, 2 *Add.* 352.) And the rule in this state was the same.

Under the revised statutes, it has been the policy to leave less to the discretion of the surrogate in the selection of administrators, by defining specifically the party entitled to the grant. The legislature have not lost sight of the principle, that the parties having the interest in the estate, should *prima facie* have the control of its administration.

Thus, it is enacted that if all the persons named in a will as executors should renounce, or after summons issued and served shall neglect to qualify, or shall be legally incompetent, letters testamentary shall issue and administration with the will annexed be granted as if no executors were named in the will, to the residuary legatees, or some or one of them, if there be any ; if there be none that will accept, then to any principal or specific legatee, if there be any ; if there be none that will accept, then to the widow and next of kin of the testator, or to any creditor of the testator, in the same manner and under the like regulations and restrictions as letters of administration in cases of intestacy. (2 *R. S.* 71, § 14.)

The foregoing section relates strictly to cases only in which there either never was an executor, or an executor never acted. But a case falls within the same principle and requires the same remedy when, after partially administering the estate, all the executors die, become incapable of executing the trust, or the power of all of them shall be revoked according to law. The death, incapacity, or removal of all the administrators of an estate, would fall under the same rule. The first case calls for letters of administration, *cum testamento annexo, de bonis non* ; and the last for an administration *de bonis non*. Both are in fact provided for in the same section, (2 *R. S.* 78, § 45,) which directs in such a case letters of administration upon the goods, chattels, credits and effects of the deceased left unadministered, with the will annexed, or otherwise as the case may be, to the widow or next of kin, or creditors of the deceased, or others, in the same manner as is directed in relation to the original letters of administration.

It has sometimes been insisted that a person so appointed administrator is not bound to give a bond like a general administrator. But the statute obviously requires the oath of office and bond from these administrators the same as in the case of a general administration. (2 R. S. 77, §§ 41, 42. *Id.* 78, § 45. *Ex parte Brown*, 2 Bradf. 22.)

With regard to the power of an administrator with the will annexed, it is enacted that where such letters are issued the will of the deceased shall be observed and performed; and the administrators with such will, shall have the rights and powers, and be subject to the same duties as if they had been named as executors in the will. (2 R. S. 72, § 22.) But this, it seems, must be understood with reference only to the personalty. Hence, a power to an executor to sell and dispose of real estate granted by a will, and to divide the proceeds among devisees to whom the estate was given by a previous clause in the same will, cannot, after the death of the executor, be executed by an administrator *cum testamento annexo*, notwithstanding the above provisions of the act. (*Conklin v. Egerton's Administrator*, 21 Wend. 430. *S. C. affirmed*, 25 Wend. 224.)

In case there are several executors named in the will, the authority vests in the survivor on the death of his companions, or in case of their incapacity to act. We have seen that in cases where there has been no executor named in the will, or if named, none has ever acted, the administration with the will annexed goes first to the residuary legatee, and if there be none, then to any principal or specific legatee, and in default of any such, then to the widow and next of kin of the testator. This branch of the statute gives the preference to the legatee over the widow and next of kin. This is contrary to the English practice in similar cases. They usually prefer the next of kin after the residuary legatee, to a specific or general legatee. (*Kooystra v. Buyskes*, 3 Phill. 531.) The reason of their rule seems to be this; where there is no residuary legatee the surplus, after paying debts and legacies, goes to the next of kin, who thus have the same interest as a residuary legatee. In most instances a legatee would feel a stronger interest

than the next of kin, especially if there was little chance of a surplus.

In case the residuary legatee survives the testator, but dies before probate of the will, the case is not provided for by the 14th section. In such a case he has a beneficial interest which vests in his representative, and, according to the common law practice, such representative had the same right to administration *cum testamento annexo*, as the residuary legatee himself, and was therefore entitled to administration in preference to the next of kin of the first testator. (*Jones v. Beytach*, 3 *Phill.* 635.) By the same reasoning, they would be entitled to be preferred before a general or specific legatee.

The right of the residuary legatee to administration *cum testamento annexo*, in England, resting only in the practice of the spiritual court, cannot, it seems, be enforced by mandamus, because it is not a strictly legal right. (*Rex v. Bettesworth*, 2 *Stra.* 956.) With us, however, it is a right declared by statute, and does not rest upon the rules of practice of the court.

In all these cases, where a party has a prior right, he must renounce or be cited, before administration can be committed to any other. Therefore, the executor, if there be one, must be cited before a grant to the residuary legatee; a residuary legatee before a grant to a specific legatee, and so on through all the gradations of priority. (2 *R. S.* 76, § 35.) So, if there be a testamentary disposition without an executor, it has been laid down that the party in whose favor the disposition is made, must cite the next of kin before he can have administration *cum testamento annexo*. In the case of a foreign will, it is the usage to grant administration, with the will annexed, to the attorney in fact of the foreign executor. If there be no one authorized to apply as such attorney, letters issue, according to the statute, to the legatee's widow and next of kin. The grant of administration is regulated by the law of the place where the assets are situated. (*In the matter of the estate of Jacinto Texador*, 2 *Bradf.* 105.)

The mode of practice in this case, differs but little from that in obtaining general administration. If the will has not been admitted to probate, the like steps must be taken to cause it to be done,

that would have been pursued by the executor if living. After probate is granted on the will, it is conceived that letters of administration with the will annexed, may be granted forthwith to the applicant on his taking the oath required by law, and executing and delivering to the surrogate the requisite bond, with sureties, duly proved or acknowledged. It is presumed that it is not a case in which the letters can be delayed on the filing of an affidavit of interested parties, as in the case of letters testamentary to an executor. (*L. of 1837, ch. 460, § 22. 3 R. S. 154, 5th ed.*) The petition to the surrogate should state all the requisite facts, showing the jurisdiction of the court, and the title of the applicant, and the proper parties to be cited, and conclude with the prayer for a citation in the usual form. The practice is quite simple, and is much like that on the application for probate, if the will has not already been proved, or that on an application for letters of administration, if probate has already been had. (See form in Appendix.)

SECTION II.

Of administration de bonis non.

The second class of special administration is an administration *de bonis non*; and the necessity for it, in this state, arises in all cases where either a sole executor dies leaving the estate of his testator unadministered, or a sole administrator dies without having completed the object of his appointment.

There is no need of such an administration in case any one, save the last of several executors or administrators to whom letters testamentary or of administration shall have been granted, shall die, become lunatic, convict of an infamous offense, or otherwise become incapable of executing the trust reposed in him; or, in case the letters testamentary, or of administration, shall be revoked or annulled, according to law, with respect to any one executor or administrator. For in such a case the remaining executors or administrators are required to proceed and complete the execution of the will or the administration, according to law. (*2 R. S. 78, § 44.*)

But if there be a plurality of executors or administrators, and

all die, or become incapable as above mentioned, or the power and authority of all of them be revoked according to law, the surrogate having authority to grant letters originally, is empowered to issue letters of administration upon the goods, chattels, credits and assets of the deceased left unadministered, with the will annexed, or otherwise, as the case may be, to the widow or next of kin, or creditors of the deceased, or others, in the same manner as herein before directed in relation to original letters of administration. The administrator so appointed is required to give bonds in the like penalty, with like sureties and conditions as required of administrators in case of intestacy, and he possesses the same power and authority. Such letters supersede all former and other letters testamentary or of administration upon the same estate. (2 R. S. 78, § 45.)

Formerly there was no occasion for letters of administration *de bonis non* on the death of a sole executor after probate, who himself made a will appointing an executor, for in such a case the entire representation of the original testator would, at common law, be transmitted to him. This rule is abolished in this state, and on the death of the sole surviving executor of any last will, letters of administration with the will annexed, of the assets of the first testator left unadministered, are required to be issued, as above provided. (2 R. S. 71, § 17. *Shook v. Shook*, 19 Barb. 656.) And this whether the sole executor dies intestate or not.

If there were several executors, and one alone proved the will, and the rest renounced, it is said that upon the death of him who proved the will, no interest was transmissible at common law, because the representation survived to the co-executors who might, in spite of their former renunciation, assume the executorship. But if they persisted in declining, an administration *de bonis non* became necessary.

This administrator *de bonis non* will, when appointed, be the only representative of the party originally deceased. (*Dale v. Roosevelt*, 8 Cowen, 333.) Such administration will evidently be committed *cum testamento annexo*, if the deceased left a will, and will be granted to the person entitled according to the general principles already developed in cases of administration. In many instances it is obvious he will be a different person from the repre-

sentative of the deceased executor ; but if the executor be also beneficially residuary legatee, his representative will likewise be entitled to the administration *de bonis non* to the original testator.

With regard to the consequences of the death of an administrator, we have seen that the statute makes no difference between the death of a sole executor and a sole administrator. Both are placed upon the same footing. The subsequent proceedings in both cases are alike.

If a party, who from his relation to the intestate at the time of his death, was entitled to administration, dies before letters of administration are obtained, his representative is entitled to the grant in preference to one who has no beneficial interest in the effects, although he may have become next of kin at the time the grant is required. (*Almes v. Almes*, 2 *Hagg. App.* 155.)

The common law, like the New York statute, adopted the principle that where the administration had been granted to two or more, and one died, the survivors or survivor became sole administrator. It was not like a letter of attorney to two, where by the death of one the authority ceased ; but it was an office analogous to that of executor, an authority coupled with an interest, which survives. (2 *P. Williams*, 121.)

With regard to the person who, upon the death of the sole or last surviving administrator, is entitled to be appointed administrator *de bonis non* to the original intestate, our statute, instead of leaving it as in England, to the discretion of the surrogate, requires that it should be granted to the widow or next of kin, or creditors of the deceased or others, in the same manner as is directed in relation to the original letters of administration. The administrator so appointed is required to give bonds with the like penalty, with like sureties and condition as required of administrators in cases of intestacy ; and he possesses the like power and authority. The letters when so granted supersede all former or other letters upon the same estate. (2 *R. S.* 78, § 45.)

The principle of the New York statute is in substantial accordance with that of the decisions under the former law, which was a transcript of the statute of Henry 8. Upon the death of an original administrator, a person who was next of kin at the time of the

death of the intestate was entitled to the *de bonis non* grant, in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death. The courts made no distinction between an *original* and a *de bonis non* administration.

The statute of this state, before cited, (§ 45,) doubtless means next of kin *at the time of the death* of the intestate. But it nevertheless takes from the court the power of an unlimited discretion, and fixes the principle on which the grant is to be made, by adopting the rule before established in cases of intestacy. The court, therefore, is bound in this state by the same rules in determining the grant of a *de bonis non* administration, that control its discretion in granting a general administration, and which have been already considered in their proper place.

The practice of the court in granting letters of administration *de bonis non* is essentially the same as that which prevails in obtaining a general administration. (See ante, and for form see Appendix.)

SECTION III.

Of administration durante minore ætate, and herein of administration to the guardian of an infant next of kin.

In the former part of this chapter, it was stated that limited administrations are of two kinds. 1st. Such as are confined to a particular extent of time; and 2d. Such as are confined to a particular subject matter; and the former was said to embrace, 1, an administration *durante minore ætate*; 2, an administration *pendente lite*; and 3, an administration *durante absentia*. (Ante, page 185.) We propose to treat in the present section, of administration *durante minore ætate*, and in connection therewith, of the granting of administration to the guardian of an infant.

This species of administration is granted where the person appointed sole executor, or he to whom, in case of intestacy, the right to administration had devolved under the statute, is under the age of twenty-one years. In the former case, it is obviously a species of administration *cum testamento annexo*.

At common law the practice was said to be to grant the administration to the guardian of the party entitled. With respect to the appointment of a guardian, a distinction exists in the spiritual courts between an infant and a minor. The former is so denominated if under seven years of age, the latter from seven to twenty-one. The ordinary *ex officio* assigns a guardian to an infant; the minor himself may nominate his guardian; who is then admitted in that character by the judge; but if he makes an improper choice the court will control it. According to the practice of the prerogative court the guardianship in either case is granted to the next of kin of the child, unless sufficient objection to him be shown. This distinction between infant and minor is recognized in our courts; but the period of infancy embraces all under fourteen, in which case the appointment is made on the recommendation of a next friend; and a minor is a person of fourteen and under twenty-one, and has a right of nominating his own guardian. But there were many instances, at common law, where administration has been granted to persons not the guardian of the minor, and where the courts refused to give it to a person nominated by him. In some instances it has been granted to a creditor in preference to the guardian. (*West v. Wilby*, 3 *Phill.* 374. *In the goods of Ewing*, 1 *Hagg.* 381.)

We have shown elsewhere, that the common law in testamentary matters and matters of intestacy, was the law of the colony of New York, and that since the revolution the entire jurisdiction in such cases became vested in the court of probate and surrogate's court; and that at the present time, it is vested in the surrogates' courts, which, in this respect, are courts of general jurisdiction, and have exclusive original jurisdiction over such subjects.

We have, it is true, but meager information as to the actual practice in the case of minors, prior to the revised statutes. The decisions of the court of probate and surrogates' courts were not reported. But we have some evidence of what the practice was at that time. Mr. Bridgen, whose treatise on the office of surrogate was published in 1825, lays it down as the proper practice to grant administration to the guardian of the infant during his minority. And in case no guardian will accept, and the administration has to be granted to a stranger, he held that it should be

so granted only *durante minore ætate*. (*Bridgen's Surrogate*, 52, 53.) Mr. Bridgen was a lawyer of respectable attainments, and held the office of surrogate in Albany county for many years ; and doubtless was familiar with its practice and that of the old court of probate, which was held in Albany.

There was an established difference at common law, where administration was granted to one as guardian to an infant, who had a right to administer, but was incapable of taking it by reason of his minority, and where administration was granted during the minority of an infant executor ; that in the last case the administration determined as soon as the executor attained the age of seventeen years ; but in the other case, it continued till the infant attained his full age. The English statutes of 38 Geo. 3, ch. 87, abrogated this distinction. It enacted that where an infant was sole executor, administration with the will annexed should be granted to the guardian of the infant, or to such other person as the spiritual court should think fit, until such infant should have attained the full age of twenty-one years, at which period and not before, probate of the will should be granted to him, the infant. And the next section enacted that the person to whom such administration should be granted, should have the same powers vested in him, as an administrator then had by virtue of an administration granted to him *durante minore ætate* of the next of kin. (*Bac. Abr. tit. Ex'r and Adm'r, B. 2, ch. 1.*)

It seems to have been the practice of the spiritual courts, in such cases, sometimes to grant a *general* administration, without any words of limitation ; and sometimes a *special* one, where the administration was granted to him, *ad opus et usum* of the infant only. In the first case it is said "he has as large a power as another administrator has, and therefore he may assent to a legacy, albeit there be no assets to pay debts ; he may sell any of the goods or chattels of the deceased, or give them away, or the like, as another administrator may do. But in the last case it is otherwise ; for such a special administrator can do little more than the ordinary himself ; and therefore, he may not sell any of the goods or chattels of the deceased, except it be in case where they are like to perish, for funeral expenses or for payment of debts ; nor may he assent to a legacy where there is not assets to

pay debts, &c." (*See also Sir Moyle Finch's case*, 6 *Coke*, 67, 68,) to the same effect. (2 *Touch.* 490.) There is no adjudged case in this state as to the *form* in which this sort of administration should be granted, or the power which it confers. The statute enacts that if any person who would otherwise be entitled to letters of administration as next of kin, or to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons. (2 *R. S.* 75, § 33.)

If this grant be *general*, the power and duty of the administrator would be the same as a general administrator in cases of intestacy.

The statute no doubt *authorizes* the grant of administration during the minority of the infant, to a guardian appointed by the surrogate, a guardian appointed by the supreme court exercising the powers of a court of equity, or to a testamentary guardian. All these several species of guardianship are placed on the same footing. (2 *R. S.* 150.) But it goes further; it *requires* the surrogate to make the grant to the guardian of the infant who is entitled and willing to accept it, and who is in other respects qualified; and thus, in effect, takes from the court, the power which it sometimes exercised at common law, of passing by the guardian, and making the grant to other parties. (2 *R. S.* 74, § 27. *Id.* 75, § 33.) It is silent as to the duration of the grant. But it requires from the person appointed administrator, a bond and oath of office, as in cases of general administration. It is silent also, as to whether the grant shall be *general* or *special*.

It is believed that the surrogate may in such a case make the grant *general*. The grant to the guardian being mentioned in connection with the general administration, without any qualification or restriction, raises the presumption that the legislature did not intend a different form in the one case from the other. But if there be no guardian, willing to accept, and the right of administration devolves on the infant, and the grant is made to a stranger, it should be conformable to the common law practice, and be made specially to the use of the infant, and determinable on his arriving at majority. The case not being within the statute, the form of the letters would be within the discretion of the court, and be

either general or special as the court should judge best. In either case, the infant on coming of age, would be entitled to call in the administration and have it revoked, and letters granted to himself. (*See remarks of Spencer, J. in Taylor v. Delancy, 2 C. C. in Error, 144, and Wickwire v. Chapman, 15 Barb. 302.*)

The guardianship terminates on the infant's arriving at full age. He is then entitled to an account from his guardian and to the general management of his affairs. If the grant of administration be *special*, it would terminate at that time, without any action of the court. If the grant be *general*, it would continue until the duties of the office had been fully discharged, unless the court, on the application of the infant, after he had attained his majority, should see fit to call in the letters, and grant administration *de bonis non* to the infant, now become an adult, in his own right.

In effect the administrator *durante minore ætate* and the executor after he becomes of age, constitute together but one representative of the original testator. They are respectively parts of an entire representation. The same doctrine applies to an administrator *durante minore ætate* granted in cases of intestacy, and the substituted administration granted to the infant on his attaining his full age.

In this state, the death, removal from office or superseding of a sole executor or administrator plaintiff, does not abate the suit but the same is allowed to continue in the name of the persons who shall succeed in the administration of the estate. (2 R. S. 115, §§ 14, 15. *Campbell v. Bowne, 5 Paige, 34. Baine v. Pine, 1 Phill. 615. Code of Procedure, § 121.*)

The question, mentioned in the old books of authority, whether an action brought by an administrator *durante minore ætate*, abated by the arriving of the infant at full age, is put at rest in this state by the code of procedure. (*Code, § 121.*) If the letters be special, and terminate on the infant's attaining full age, it operates merely as a transfer of interest, by force of law, from the administrator to the infant, and the court will allow the action to be continued by or against the infant; or, if need be, in the name of the party in whose favor it was commenced. In case the letters

were general, it is very clear that the arrival of the infant at full age would have no effect on the action, until the court should revoke the grant and make a new one to the infant; in which case the latter would be substituted for the former.

The mode of obtaining the grant in cases of this kind, is similar to that of obtaining letters of administration. The petition must be varied only to suit the circumstances of the case.

SECTION IV.

Of collector, and herein of administration pendente lite, durante absentia, and of other limited or temporary administrations.

In addition to the special administrations which we have been considering in the preceding sections, there were, at common law, several others, which we will now proceed to notice. The two most important of these, were the one granted *pendente lite*, and the one granted *durante absentia*. The first was granted at common law, in case of a controversy in the spiritual court concerning the right of administration to an intestate, or the granting of probate upon a will; and the second, where the executor named in the will, or the next of kin, were out of the state, and probate had not been granted or letters of administration issued, in all of which cases the court had the power to grant to another a limited administration, *durante absentia*. (*Walker v. Woolaston*, 2 P. Wms. 589. *Wills v. Rich*, 2 Atk. 286.) It is believed that both these kinds of administration were occasionally granted in this state, under the colonial government, and under the state government, prior to the adoption of the revised statutes. These, and various other species of special administration, were not within the letter of the English statutes of Henry 8, regulating the granting of administration, but were supposed to be within its equity, and the courts in making the grant were governed by their own practice. The statute of Henry 8, on this subject, was held by the court of errors, as early as 1815, to be a part of the law of the colony, and was said to have been adopted as the law of the state by the constitution of 1777. (*Per Spencer, J. in Taylor v. Delancy*, 2 C. C. Error, 149.) It was subsequently re-enacted substantially in the act of 1787, and the revised laws of 1801, and

in the act of 1813. (1 *R. L. of 1813*, p. 444.) According to the general principle in such cases, the adoption by the colony of the statute law of the mother country, usually carries along with it, the practice of the courts growing out of it, so far as they are applicable to the circumstances and condition of the colony. The incidents and accessories generally follow the state of the principal.

The former practice of granting a limited administration, *pendente lite*, and *durante absentia*, has not been, in terms, repealed, nor is it entirely incompatible with our practice in other respects. But the revised statutes of 1830, as modified by the act of 1837, have provided a convenient substitute for both these kinds of special administration, and which will, in effect, supersede the former practice. (2 *R. S.* 76, §§ 38 and 39, as amended by act of 1837, ch. 46, §§ 23, 24. 3 *id.* 160, 161, 5th ed.)

It is provided by the statute above cited, that in case of a contest relative to the proof of a will, or relative to granting letters testamentary or of administration with the will annexed, or of administration in cases of intestacy, or where by reason of absence from this state of an executor named in a will, or for any other cause, a delay is necessarily produced in granting such letters, the surrogate authorized to grant the same may, in his discretion, issue special letters of administration, authorizing the preservation and collection of the goods of the deceased.

The collector so appointed is clothed with authority to collect the goods, chattels, personal estate and debts of the deceased, and to secure the same at such reasonable expense as the surrogate shall allow, and for these purposes he may maintain suits as administrator. Under the direction of the surrogate, he may sell such of the goods of the deceased as shall be deemed necessary for the preservation and benefit of the estate, after the same shall have been appraised.

The collector is required to take the oath of office like an administrator. (2 *R. S.* 77, § 41.) He is also required to execute a bond with sureties, to be approved by the surrogate, in the same penalty as in the case of an administrator, and the same proceedings are to be had in order to ascertain the penalty. The condition of the bond is, that he shall make a true and perfect invento-

ry of such of the assets of the deceased as shall come to his possession or knowledge, and return the same, within three months, to the office of the surrogate granting such letters; that he will faithfully and truly account for all property, money and things in action, received by him as such collector, whenever required by the said surrogate, or other court of competent authority; and will faithfully deliver up the same to the person or persons who shall be appointed executors or administrators of the deceased, or to such other person or persons who shall be appointed executors or administrators of the deceased, or to such other person as shall be authorized to receive the same by such surrogate. (2 R. S. 77, § 43.)

This species of special administration is never granted except where there is a necessary delay in proving the will, or the rightful executor is out of the state. In one case, during a contest on the probate of a will, a special collector had been appointed by the surrogate of the city and county of New York, with directions not to institute suits without the permission of the surrogate; the widow of the deceased claimed certain property as gifts made to her in the lifetime of her husband, the collector having applied for leave to test the validity of the gifts in an action at law, permission was granted by the court. (*Delafield v. Parish*, 4 Bradf. 24.)

With respect to the right to institute suits, it was held in the same case, that the collector stands on the same footing as other administrators, and is the judge of the propriety of his own course of action, subject only to his liability when the administration is terminated, and the accounts are settled before the surrogate. If he fail to institute suits at the instance of parties in interest, upon the offer of sufficient indemnity, he may be held accountable for the loss resulting from his refusal. (*Id.*)

The appointment of a collector is entirely within the discretion of the surrogate, and is usually made whenever there is a probability of long delay in the grant of administration in chief. Pending litigation of the probate the estate should not be left without official care and supervision, and in making this appointment an indifferent person should be selected. It is not proper or customary to appoint either of the litigating parties, collector. (*Mootrie v. Hunt*, 4 Bradf. 173.)

In the city of New York, it is said by Mr. Dayton in his valuable treatise (Dayton's Surrogate, 231) that the public administrator is generally selected as the collector, in case of a contest about a will or the grant of administration. The court in such cases have allowed that officer, pending such a contest, to sell such portions of the assets as may be necessary for the preservation and benefit of the estate. (*The Public Administrator v. Burdell*, 4 *Bradf.* 252.)

If there be a clear outstanding legal title adverse to the estate, the court may refuse the sale; yet if there be reasonable cause for doubt, the proper course is said to be to permit the sale and let the question be tested by the court having jurisdiction of the subject matter. If the alleged adverse interest be well founded, the party has an adequate remedy in courts of law. (*Id.*)

When the purpose for granting this special administration has terminated, the authority conferred by it comes to an end, and the party rightfully entitled to the control of the estate should be put in possession. The criterion by which this is determined and some of the consequences are provided for in the statute. Upon letters testamentary, or of administration, being granted, the power and authority of the collector ceases. But any suit brought by him may be continued by the executor or administrator, in the name of the collector, which he shall not have power to discontinue or release. Such collector on demand is required to deliver to the executor or administrator all the property and money of the deceased in his hands, and shall render an account on oath to the surrogate, of all his proceedings, upon being cited for that purpose, or without such citation. Such delivery and account may be enforced by an order of the surrogate, and by attachment to be issued by him as in other cases of administration. (2 *R. S.* 77, § 40. (*Gottsberger v. Smith*, 2 *Bradf.* 86.) It is presumed since the adoption of the code, the rightful executor or administrator, as the case may be, can be substituted for the collector in all pending suits. (*Code*, § 121.)

There are several other instances of temporary and limited administrations granted as well *cum testamento annexo* as in cases of intestacy, which are not embraced in either of the preceding heads. Thus, if a testator appoints an executor for a limited time

and afterwards to another person ; or if he appoints an executor to take effect at a future day, it is evident that before the time thus designated arrives, a limited administration must be granted *cum testamento annexo*. (*Toller*, 36. 1 *Wms. Ex'rs*, 203.) This case is not covered by the provision for the appointment of a collector. There are numerous cases collected by Mr. Justice Williams in his excellent treatise on executors and administrators, volume 1, page 425 to 439, and which show the occasional necessity for a special administration, to do a particular act. In some of those cases the collector appointed under the New York law would answer the purpose, and in others a remedy might be obtained by an action in the nature of a bill in equity.

It has always been the policy of the common law to leave no right without some efficient means to enforce it, and to provide an appropriate remedy for every wrong. As the legislature has not expressly repealed the authority to grant limited and temporary administrations in cases not hitherto mentioned, and as the only clause in the revised statutes which contained an implication which might be construed into such repeal of the common law authority, has itself been repealed, (2 *R. S.* 221, § 1, *sub.* 8, *repealed by L. of 1837*, p. 536,) it seems to follow that the jurisdiction to grant special administrations, not mentioned in the revised statutes, still remains. The providing of a new remedy to enforce an existing right does not take away the old remedy, unless the substituted remedy is incompatible with that which before existed, or there is an obvious intention of the lawgiver to repeal the former. (*See per Beardsley, J. in The People v. Guild*, 4 *Denio*, 552.) Thus, the code of procedure, which substituted supplementary proceedings on the return of an execution unsatisfied in whole or in part, for the former practice of creditors' bills, has never been thought to oust the supreme court of jurisdiction to reach the choses in action of a judgment debtor, in a proper case, by an action in the nature of a creditor's bill. On the same principle, the enlarging the power of the collector, as the office was known at common law, and conferring upon him powers formerly exercised only by a special administrator, cannot prevent the court from still resorting to the appointment of a special administration when that measure becomes essential to protect the rights of parties.

SECTION V.

OF THE ADMINISTRATION BOND, AND THE BOND GIVEN BY
AN EXECUTOR BY ORDER OF THE COURT.

We have already shown that an administrator and collector are both required to give bonds with sureties conditioned for the faithful execution of their trust. The form of those bonds are substantially given in this statute, and have been already stated in this treatise. (3 *R. S.* 163, 164, 5th ed. 2 *R. S.* 77.) The bond required of an executor, on the objection of a party interested, that his circumstances are so precarious as not to afford adequate security for his due administration of the estate, is similar in its form to that required of administrators. (2 *R. S.* 72, § 20.) It is for the benefit of every person interested in the estate of the testator, and not merely for the benefit of the distributee, upon whose application the surrogate directs it to be given. (*Holmes v. Cock*, 2 *Barb. Ch.* 426.)

The language of the statute is that *every* person appointed administrator shall, before receiving letters, execute a bond to the people with two or more competent sureties. If there be several administrators, it is not deemed indispensable that each should execute a separate bond with sureties, though such a practice would be legal and a literal compliance with the act. But the provision is satisfied by the executing of a single bond by all the administrators and their sureties. This does not make each administrator a surety for his co-administrator, or liable for any but his own acts, and such joint acts as he participates in. The sureties are liable not only for the defaults of the whole, but for those of each one of the administrators. (*Kirby v. Turner*, 1 *Hopkins*, 333.)

The bond in these cases is something more than a bond of indemnity. It is a part of the condition that the principal shall obey all orders of the surrogate. This is equivalent to a covenant to pay all judgments that may be recovered against him for a specified cause. (*Baggott v. Boulger*, 2 *Duer*, 169.) The action on the bond may be brought in the name of the people, or in the name

of the party for whose benefit the prosecution is ordered. (*Id. Code*, 111.)

The bond is for the benefit, among others, of the creditors of the deceased. But a creditor, at large, cannot maintain an action on it. He must first procure a decree of the surrogate in his favor, ordering payment of his claim and directing a prosecution of the bond in case the administrator omits to pay it. (*People v. Barnes*, 12 *Wend.* 492. *Same v. Corlis*, 1 *Sandf. S. C. R.* 228.)

Although by the acts of 1837 and 1844 the decree of a surrogate may be docketed and thus become a lien upon real estate, still the party having a decree in his favor, may proceed and obtain an order for the prosecution of the bond, without first resorting to the real estate of the administrator. The two proceedings are not incompatible with each other, and are cumulative remedies. (*The People v. Guild*, 4 *Denio*, 552.)

The omission to file an inventory within the time required by law, cannot be assigned as a breach, unless it is shown that the relator has sustained some injury from the omission. (*The People v. McDonald*, 1 *Cowen*, 189.)

By the law of 1851, page 332, all bonds given by an administrator or executor which are required to be filed in the surrogate's office, must be proved or acknowledged in the manner deeds are required to be proved or acknowledged, before the same shall be filed by the surrogate. (For form of bond, see Appendix, No. 40.)

CHAPTER IX.

OF THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION AS LONG AS THEY ARE IN FORCE; OF THE REVOCATION OF THEM, AND OF THE CONSEQUENCES THEREOF.

SECTION I.

Of the effect of probate and letters of administration, as long as they remain unrepealed or unrevoked.

It has been shown that the surrogate's court is the only court of original jurisdiction in matters testamentary and of administration in this state. It is a court, too, in this respect of exclusive

jurisdiction. Its decrees, therefore, pronounced in the exercise of this exclusive jurisdiction, are binding on all other courts, and conclusive evidence of the right *directly* determined. (1 *Phil. Ev.* 343.) They are not evidence of matters *incidentally* contested before the court which pronounced them, nor of matters merely inferrible from them by argument. (*C. & Hill's Notes*, 858.) With regard to the probate of a will of personal property, the legislature have enacted this principle, and declared that where such probate is taken by a surrogate having jurisdiction, it shall be conclusive evidence of the validity of the will; until such probate is reversed on appeal, or revoked by the surrogate in the manner pointed out by the act, or the will is declared void by a competent tribunal. (2 *R. S.* 61, § 29. *Vanderpoel v. Van Valkenburgh*, 2 *Seld.* 190.) It is in the nature of a proceeding *in rem*, to which all persons having an interest in the subject of litigation may make themselves parties, and are consequently bound by the decree. (*Id.* *Bogardus v. Clark*, 4 *Paige*, 623. *Muir v. The Trustees of the Leake and Watts Orphan Asylum*, 3 *Barb. Ch.* 481.)

The English cases go the length of deciding that such probate is conclusive as to the appointment of an executor, and the validity and contents of the will, and cannot be impeached by evidence even of fraud. (*Plume v. Beale*, 1 *P. Wms.* 388. *Archer v. Mosse*, 2 *Vernon*, 8.)

As a consequence from these principles, it has been held not to be allowable to prove that another person was appointed executor, or that the testator was insane, or that the will of which probate had been granted was forged; for that would be directly contrary to the seal of the court of probate in a matter within its exclusive jurisdiction. (*Id.* 1 *Lev.* 235. *Allen v. Dundas*, 3 *T. R.* 125. 1 *Str.* 671.)

The case of *Allen v. Dundas*, supra, presented the question of payment to a person who had obtained probate as executor of a supposed will of a creditor, whereas the will was a forgery, the probate subsequently revoked, and letters of administration granted to the next of kin of the creditor, who commenced an action for the same debt. The principal ground on which the counsel for the plaintiff contended that the payment to the executor of the forged will was no defense to an action brought by the rightful administrator was, that the executor derived his whole authority from the

will, the probate being merely evidence of his right, and therefore, it was like the case of a payment under a forged bill, bond, power, &c. But it was answered and resolved by the court that the act of granting probate is a *judicial* and not a mere *ministerial* act, and that every person is bound by the judicial acts of a court having competent authority; that this case is different from payment under forged bonds or bills of exchange; for there the party is to exercise his own judgment, and act at his peril. But in the case of a will the *original* is not presented to the party paying; all he can require is the *probate*, that is, a copy of the will authenticated by the certificate and seal of the court. He has no means, therefore, of detecting the forgery, in point of fact, and public policy requires that full credit should be given to the probate till it is vacated.

The same doctrine has been recognized in this country. (*In appeal of Peebles*, 15 *Serg. & Rawle*, 42.) And additional force is imparted to the justice of the rule in this state, arising from the fact that the authority of the executor to receive payment is derived rather from the court than the will. But the justification of the debtor in paying to the executor of a forged will, depends mainly on the conclusive nature of the probate; it being evidence not to be disputed, of the existence of the will.

Although the probate is thus conclusive in *evidence*, it is not so in *pleading*, but an executorship, or administratorship may be denied in pleading, by a plea of *ne unque executor*, or *administrator*, notwithstanding profert of the probate or letters of administration. This traverse upon issue joined, must be tried by the country; and upon such trial, the production of the probate, or letters of administration, will be conclusive evidence of the fact.

Although the will of a married woman made in pursuance of a power must be admitted to probate, in order to confirm judicially its testamentary nature; yet it is said, the production of such probate is not alone sufficient to induce a court of equity to act upon it; for there are other special circumstances which may be required to give the instrument effect as a valid appointment, viz: attestation, sealing, &c., with which circumstances the temporal courts have not trusted the judgment of the spiritual courts. The witnesses, therefore, to these facts, must be examined in chief to prove that the will was the wife's act. And if an attestation be

not required by the power, still her signature must be proved. (*Rich v. Cockell*, 9 Ves. 376.) This results from the position, that the conclusiveness of the probate is limited to the testamentary character of the instrument.

On this principle it would seem that though the probate of a will of a married woman, under the act of April 11, 1849, (*L. p.* 528,) would be conclusive as to its testamentary character, it would not be evidence that the personal property she attempted to bequeath was obtained by her by gift, grant, or bequest from any person other than her husband; and therefore should a question arise between her legatee and her husband, after her death, as to her right to bequeath the property in dispute, it must be settled by evidence, aliunde the probate. This question has not yet been decided, but there are principles settled which have a bearing on it. (*Wadham v. The Am. Home Miss. Society*, 2 Kern. 415.)

The common law jurisdiction of granting probate on wills and testaments did not extend to a devise, and therefore the probate is no evidence of the validity or contents of a will relating to real estate, not even where the original is lost, except as a mere copy. (*Bull. N. P.* 245.) By the N. Y. revised statutes, we have seen, provision is made for recording wills of real estate, in the surrogate's court, and making such will, accompanied with the surrogate's certificate of its being proved and recorded, the record of such will, or the exemplification thereof, evidence without further proof, and as effectual in all cases as the original will would be, if produced and proved. But it is not made, as in the case of a probate of a will of personal estate, *conclusive*, but the statute leaves it open to be repelled by contrary proof. (2 R. S. 56, § 15.) In the case of a probate it has been held that, in a collateral action, the decree of the surrogate having jurisdiction, declaring the will duly executed, could not be impeached by showing that there was but a single subscribing witness to the will, while the law requires at least two. (*Vanderpoel v. Van Valkenburgh*, 2 Seld. 190.)

But although the probate of wills, and letters testamentary granted thereon, being the judicial acts of a court having competent authority, cannot be impeached collaterally, yet it may be proved that the court which granted them had no jurisdiction,

and that, therefore, their proceedings are a nullity. Thus, in *Marriot v. Marriot*, (1 *Str.* 671,) it was ruled that evidence might be given that the seal of the court was forged, because that is not in contradiction to the *real* seal of the court, but admits and avoids it. On the same principle, it was said by Buller, J. in *Allen v. Dundas*, (3 *D. & E.* 130,) that it might be proved that the supposed testator was alive; for in such case the court had no jurisdiction. (*Appeal of Peebles*, 15 *Serg. & Rawle*, 39.) In like manner it is presumed that proof of any of the facts which, if true, oust the court of jurisdiction, may be given. Such proof would render the decree *coram non judice*, and void. But matters which merely render it erroneous, and which would authorize the surrogate to revoke it, or subject it to a reversal on appeal, cannot be interposed in a collateral proceeding, to defeat a right claimed under letters testamentary or letters of administration.

SECTION II.

Of the revocation of probate.

It has been seen that the statute, while it declares the conclusive nature of the probate of a will, assumes that it may be revoked by the surrogate of the county where it was proved, and that it may be reversed on appeal, and that the will may be declared void by a competent tribunal. On the happening of either of these events, the probate ceases to be conclusive, or, indeed, to be evidence of the validity of the will.

There are, therefore, two ways for putting an end to probate as evidence; 1st, by revocation on a suit by *citation* before the same court; and 2d, by *appeal* to a higher tribunal. We shall treat, in this section, of the proceedings by citation.

It has already been stated, that at common law, the executor of a will proved in common form, that is, on the oath of the executor, without citation to the next of kin, might be compelled, by a person having an interest, to prove it *per testes*, in solemn form, at any time within thirty years. The practice in this state prior to the revised statutes in 1830, was to prove the will by the oath of the executor and one or more of the subscribing witnesses, on an

ex parte application to the proper court, unless a caveat had been entered in the office of the judge of probate, or surrogate; in which case the judge or surrogate was required to cite the parties and witnesses to appear before him, and grant probate, letters testamentary or administration agreeably to law. (1 *R. L.* 446, § 9. *Bridger's Sur.* 30, 32. *Collier v. Idley's Ex'rs*, 1 *Bradf.* 94. 2 *Burn's E. L.* 618, *quarto ed.*)

A caveat is a mere cautionary act to prevent the court from committing a wrong; and it was said to be in force for three months, and that while it was pending probate could not be granted. (*Toller*, 72, 73. *Burn's E. L.* title *Caveat*.) The better opinion is that probate granted in spite of a caveat was not void, but erroneous; and therefore liable to be recalled or reversed.

Though the practice of entering caveats in this state is not in terms abolished, yet it has in a measure been superseded since a citation to the proper parties has been required, in all cases previous to admitting a will to probate, and of which we have fully treated in a previous chapter. But as the period between the issuing and return of the citation in these cases is short, and as a personal service is not in all cases required, and as the probate was intended to be conclusive, and the period of thirty years within which persons interested might formerly require the executors to prove the will *per testes*, was in effect superseded, it was deemed best by the legislature to substitute a new mode of submitting the will to a re-examination, and to abridge the time within which it could be done. (*Collier v. Idley's Ex'rs*, 1 *Bradf.* 94.) Accordingly it is provided, that notwithstanding a will of personal property may have been admitted to probate, any of the next of kin to the testator, may at any time, within one year after such probate, contest the same, or the validity of such will. (2 *R. S.* 61, § 30.) This power is only given to a *next of kin*. It is not given to a creditor, nor to a person, not a next of kin, who as a descendant of such next of kin might be entitled to a distributive share of the estate in case the deceased had died intestate.

The relative thus applying, who must be a next of kin, is required for the purpose of the application to file in the office of the surrogate by whom the will was proved, his allegations in writing against the validity of the will, or against the competency of the

proof thereof. (*Id.* 31.) (See Appendix, No. 30, for form of allegation.)

An allegation is in the nature of a declaration in courts of common law, and it may have one or more *articles*, which answer to counts in a declaration. It should contain, in a clear and logical form, a statement of the facts relied upon by the party, against the validity of the will, or against the competency of the proof on which it was admitted to probate, as one or the other is the ground of complaint.

According to the practice of the prerogative court, the facts intended to be relied upon in support of any contested suit are set forth in a plea, which is termed an allegation; this is submitted to the inspection of the counsel of the adverse party; and if it appears to them objectionable, either in form or substance, they *oppose the admission of it*. If the opposition goes to the substance of the allegation, and is held to be well founded, the court rejects it; by which mode of proceeding, the suit is terminated without going into any proof of the facts. (*Thorold v. Thorold*, 1 *Phill.* 1, *note a.*)

In this state, the proceeding by allegation in a proper case has been countenanced by the court of chancery. (*The Public Administrator v. Watts*, 1 *Paige*, 347.)

The practice, upon filing the allegation is, in this state, prescribed by the statute, and differs in some respects from that of the prerogative court. It contemplates that the surrogate shall hear the *proofs* of the parties, and that his decisions shall be based upon the proofs. It is enacted, that upon the filing of the allegations, the surrogate shall issue a citation to the executors, who shall have taken upon themselves the execution of the will, or to the administrators with the will annexed, and to all the legatees named in the will, residing in this state, or to their guardian, if any of them be minors, or to their personal representatives, if any of them be dead, requiring them to appear before him on some day to be therein specified, not less than thirty nor more than sixty days from the date thereof, at his office, to show cause why the probate of such will should not be revoked. (2 *R. S.* 61, § 32.) (Appendix, 31, 32.)

After the service of the citation, the executors or administrators

are required to suspend all proceedings in relation to the estate of the testator, except the recovery of moneys and the payment of debts, until a decision shall be had on such allegations. (*Id.* 33.)

At the time appointed for showing cause, and at such other times thereafter as the surrogate shall appoint, upon due proof being made of the personal service of such citation, upon every person named therein, at least fourteen days before the time appointed for showing cause, the surrogate shall proceed to hear the proofs of the parties. (*Id.* 34.) These proofs on the part of the complaining party should be confined to the facts set forth in his allegations. If any legatees named in the will shall be minors, and have no guardian, the court is required to appoint guardians for them, to take care of their interests in the controversy.

If upon hearing the proofs of the parties the surrogate shall decide that such will is for any reason invalid, or that it is not sufficiently proved to have been the last will and testament of the testator, he is required to annul and revoke the probate thereof; if otherwise, he is to confirm it. (*Id.* § 35.) The judgment of the court must follow the nature of the allegation and the proofs.

Upon the hearing before the surrogate, the depositions of witnesses taken on the first proof of the will, who may be dead, insane, or out of the state, may be received in evidence. (*Id.* § 36.) If the witnesses be alive and in the state, and of sound mind, they must be produced for examination, as in the ordinary case of proving the will. (*Collier v. Idley's Ex'rs*, 1 *Bradf.* 94.) It is in the nature of a new trial.

The revocation or annulling of such probate is to be entered in the records of the court, properly attested, and notice thereof is required to be served on the executors or administrators, and to be published three weeks in a newspaper published in the county, if there be one, the expense of which is to be taxed as part of the costs of the proceedings. Upon the service on the executor or administrator, his power or authority ceases, and he is required to account to the representatives of the deceased, whose alleged will was contested, for all moneys and effects received. But he is not liable for any act done in good faith, previous to the service of the citation, nor for any acts so done in the collection of moneys or

payment of debts, after the service of the citation, and previous to the service of the notice of revocation. (§ 38.)

If the will or probate is confirmed, the costs are to be paid by the party contesting them; and in case it is revoked, the party resisting may be ordered to pay the costs, either personally or out of the property of the deceased, as the surrogate shall see fit. The payment of costs is in all cases enforced by attachment. (§ 39.)

If the application before the surrogate be to revoke the probate, on the ground that the proof on which it was granted was insufficient, it would seem, from the language of the 35th section, that if on the hearing before the surrogate the defect is supplied, and the will, therefore, is *then* sufficiently proved, the probate should be confirmed, without regard to the insufficiency of the original proof. (*Collier v. Idley's Ex'rs*, 1 *Bradf.* 94.)

An appeal lies from the decision of the surrogate to the supreme court. (2 *R. S.* 62, § 35. *Id.* 66, § 55, *as modified by the act of 1847, ch. 280*, § 17. 3 *id.* 150, 5th ed. *Williams v. Fitch*, 15 *Barb.* 654. *Whitbeck v. Patterson*, 22 *id.* 83. *Alston v. Jones*, 10 *Paige*, 98.) The mode of conducting the appeal belongs to treatises on the practice of the supreme court, and does not come within the scope of the present treatise.

The foregoing provisions have not hitherto led to much discussion in the courts, and it is not probable that cases will often arise under them. In the case of *Mason v. Jones*, (2 *Bradf.* 325,) it was held that where, upon allegations, it has been finally determined that the will is not sufficiently proved, any of the next of kin, not a party to the contest, may avail himself of the decision, though it was not obtained at his instance. This was put upon the ground that proceedings in respect to probate or administration, are not properly suits or actions, but are special proceedings, of a mixed character, capable of being promoted by any one interested; and, when finally determined, the judgment partakes so far of the character of a judgment *in rem*, that any other party in interest can avail himself of it.

There were a variety of grounds for revoking probate, on citation, at common law, besides the invalidity of the will, and the

incompetency of the proof on which probate was granted. Thus, fraud or surprise was a sufficient ground, as was also the finding a later will. It is conceived, however, that in the latter case, the proceedings should be by allegation, as pointed out by the statute above; because, if the later will be established, it proves that the first was invalid at the time probate thereof was granted.

On principle, it is plain that if the allegation does not contain sufficient facts to entitle the party to the relief sought, the surrogate may dismiss the complaint, as is done by the prerogative court. It would be a useless waste of time to hear proof of matters immaterial to the question in dispute. (See forms in Appendix, 26 to 34.)

SECTION III.

Of the revoking of letters testamentary, and letters of administration, and of the effect upon intermediate acts.

Letters testamentary may be revoked without interfering with the validity of the will, or the probate thereof. The ground for revoking letters testamentary and letters of administration is mainly the same. (1.) With respect to letters testamentary, the statute has provided that if the executor has become incompetent by law to serve as such, or his circumstances are so precarious as not to afford adequate security for his due administration of the estate, or that he has removed, or is about to remove from the state, the surrogate of the county in which the letters were granted shall, on complaint made by a person interested in the estate of the deceased, proceed to inquire into the complaint. (2 *R. S.* 72, § 18.) For this purpose, on filing the complaint, duly verified by the oath of some person, a citation is to be issued, directed to the person complained of, requiring him to appear before the surrogate at a day and place therein to be specified, to show cause why he should not be superseded. This citation must be served on the party, if in the county, at least six days before its return; and if he has absconded, it may be served by leaving it at his place of residence. (*Id.* § 19.)

Upon due proof of the service of the citation, the surrogate proceeds, at the day appointed, or on such other day as he shall ap-

point, to hear the proofs and allegations of the parties ; and if it appears that the circumstances of the person so appointed are precarious, as aforesaid, or he is about to remove from this state, the surrogate requires him to give bond, with sureties, like those required by law of administrators, within a reasonable time, not exceeding five days. If he neglects to give the bond, or if it appears that he is legally incompetent to serve as executor, the surrogate is required, by order, to supersede the letters testamentary issued to such person, whose authority and rights as executor shall thereupon cease ; and if there be no acting executor of such will, the surrogate must grant letters of administration with the will annexed, of the assets of the deceased left unadministered, according to law. (*Id.* § 20.) (See Appendix for forms, No. 26, et seq.)

An executor may be said to be incompetent, by law, to serve as such, where either of the objections against him exist, which by law would render him incompetent to serve. (3 *R. S.* 154, § 3, 5th ed.) Whatever will justify the court in withholding the appointment, under the above section, if the objection be made within the thirty days from the granting of the probate, will authorize the court to supersede the letters testamentary, although granted without objection.

Some of the foregoing provisions have received a judicial exposition. In one case, where it appeared before the surrogate, on an application by legatees for the removal of the executor, that no inventory had been filed by him ; that the executor was squandering the estate in useless litigation ; that he had delivered over to his attorney all the money and mortgages of the estate, and was ignorant as to what belonged to the estate ; that he could not read writing or write good English ; and that he had little or no property, was not in any steady or useful employment, kept no accounts and had no knowledge of the condition or disposition of the trust property, except what was derived from his attorney, it was held by the supreme court of the second district that these facts were sufficient to justify the removal of the executor, on the ground of improvidence and incompetency. (*Emerson v. Bowers*, 14 *Barb.* 658.) This case was reversed by the Court of Appeals for the reason that the facts disclosed did not show *improvidence*, and that the application should have been for an order requiring the

executor to give security for his faithful performance of the trust, and in default of doing so, a supersedeas should be granted. (*S. C. 4 Kern. 449.*) So also, in that case, the failure to file an inventory, if the proper proceedings had been taken, would have led to the same result. The reversal seems to have been on a technical ground, in presenting the case to the surrogate's court.

(2.) The revocation of letters of administration was supposed, before the statute of 21 Henry 8, to rest in the pleasure of the ordinary. Since that statute such letters have not been repealed but for some just cause. Chancellor Kent assumes that if letters of administration should have been unduly granted, they may be revoked. (2 *Kent's Com.* 413.)

Although at one time it was supposed that the power of the ordinary, after having made the grant of administration, was exhausted, and he could not afterwards revoke it, yet, notwithstanding that opinion, it is now agreed in England, that the ordinary may revoke or set aside an administration granted to the next of kin, and that for several causes; as if they forge or suppress a will; if they come too hastily to take out administration within the fourteen days; if they go beyond sea; become *non compos*; or if they take out administration without security to account and exhibit inventories; or, if there be a residuary legatee; and may in general for any fraud used in obtaining it; for it would be absurd to allow a court jurisdiction herein, and at the same time deprive them of the liberty of vacating and setting aside an act of their own, which was obtained from them by deceit and imposition. (*Bac. Abridg. title Ex'rs and Admin. E 12, and the cases collected there. 1 Wms. Ex'rs, 479.*)

This subject, like the revocation of letters testamentary is very fully anticipated by the revised statutes. They provide as well for the rights of parties interested in the estate, as for the sureties in the administration bond, who desire to be discharged from future liability; they contain enactments in relation to letters of administration issued upon false representations, and for the recalling of letters where the administrator has become incompetent by reason of drunkenness, improvidence or want of understanding; for the case of the marriage of a female administrator; and for a case where it

shall appear that the bond taken on making the grant has become of inadequate amount ; for the neglect or refusal of a non-resident administrator to account ; for a neglect and refusal to return an inventory, when duly required by the court, and probably for other cases. It is proposed to notice briefly some of these provisions. The practice under them is similar to that on instituting proceedings to revoke or supersede letters testamentary.

If the application be for the insufficiency of the sureties to the administration bond, it must be made by a party interested in the estate. It can be made whenever it is discovered that the sureties of any administrator are *becoming* insolvent, that they have removed, or are about to remove, from this state, or that for any other cause they are insufficient. It must be made to the surrogate of the county who granted the letters. (3 *R. S.* 163, § 47, 5th ed. *L. of 1837, ch.* 460, § 25.)

If satisfied by the evidence that the matter requires investigation, the surrogate issues his citation to such administrator, requiring him to appear before the surrogate at a time and place to be therein specified, to show cause why he should not give further sureties. This citation must be served personally on the administrator, at least six days before the day for its return. If he shall have absconded or cannot be found, it may be served by leaving a copy at his last place of residence. (*Id.* § 48.) If, on hearing the proofs and allegations of the parties, it should satisfactorily appear that the sureties are for any cause insufficient, the surrogate is required to make an order requiring the administrator to give further sureties in the usual form, within a reasonable time, not exceeding five days. (§ 49.)

On his neglecting to comply with this order within the time required, the surrogate is directed to revoke the letters of administration issued to such administrator, whose authority as such shall thereupon cease. (*Id.* § 50.)

In analogy to the case of an application to remove an executor, the petition of the interested party should state such particulars as to the pecuniary circumstances of the sureties as *prima facie* to render it probable that the estate is unsafe without further security. (*Colegrove v. Horton*, 11 *Paige*, 261.)

It may sometimes happen that the sureties themselves may desire to be released from responsibility, on the account of the future acts and defaults of the administrator. In such a case the surrogate is to cause the administrator to be cited to show cause why he should not give new sureties. This citation is to be served in the same manner as in the preceding case. If the administrator shall give new sureties, the surrogate may thereupon make an order that the sureties who applied for relief shall not be liable on the bond for any subsequent act, default or misconduct of the administrator. If the administrator neglects to give the new security within the time allowed for that purpose, the surrogate is required by order to revoke the letters of administration, whose authority and rights as an administrator shall thereupon cease. (3 *R. S.* 163, 164, § 51 to 54, 5th ed. *L. of 1837, ch. 460, §§ 29, 32.*)

What will be a sufficient ground for the relief of the surety on such an application will depend on the circumstances of each case. There must be some adequate cause, and not a mere capricious change of opinion as to his willingness to be surety.

The removal of one of several administrators does not impair the authority or duty of the remaining administrator, but on the contrary the whole interest becomes vested in the remaining administrator, who is empowered to continue all suits in his name, which were commenced before such revocation. If, however, a sole surviving administrator be removed, the surrogate is to grant administration of the goods, chattels and credits not administered, in the manner provided by law. (3 *R. S.* 164, § 55, 5th ed.)

There is still another class of cases for the revoking of letters, provided for by the statute, and some of which it is believed existed at common law. Thus, if it is made to appear that the letters of administration have been granted by reason of false representations, made by the person to whom they were granted, and also whenever it shall appear that the administrator has become incompetent by law to act as such by reason of drunkenness, improvidence or want of understanding, the surrogate is clothed with power to revoke the letters. And also in case a female administratrix marries, the surrogate possesses the like power. In all these cases the application to be effectual must be made by a party having an interest. (*Id.* § 56.)

The marriage of a female sole administrator has the effect to make her husband liable for her acts. At common law, the surrogate would have no power to remove an administratrix for this cause. It is a power given to him by the statute, and to be exercised only on the application of a party interested in the estate. (*Woodruff v. Cox*, 2 *Bradf.* 153.)

It has been shown in a former part of this treatise, that before granting letters of administration, the person so appointed shall give a bond to the people of this state, with two sufficient sureties to be approved by the surrogate, in a penalty of not less than twice the value of the personal estate of which the intestate died possessed. It may well happen that the surrogate, at the time of taking the bond, has imperfect evidence of the value of the personal estate to be administered, and it is subsequently ascertained that the penalty of the bond is inadequate in amount for the purpose for which it was taken. The statute provides for such a case, and empowers the surrogate to make an order requiring the administrator to give additional security for the faithful performance of his duty, and in case of non-compliance to revoke the letters granted to him. This and the preceding provision relates also to executors who have given security, as well as to guardians. (3 *R. S.* 164, § 57, 5th ed.)

There are cases where an executor or an administrator may be absent from this state, or become a non-resident, and where consequently the judgments and process of the court to compel an account would be ineffectual at common law. The statute, however, authorizes such administrators or executors to be cited to account pursuant to law, and if such parties neglect or refuse, without a reasonable cause, to appear in obedience to such citation, the surrogate is authorized to revoke the letters testamentary or of administration, and to grant letters testamentary or of administration of the goods, chattels and effects of the deceased left unadministered, to the person entitled thereto (other than such executor or administrator) in the same manner as original letters of administration or letters testamentary, with the like effect as when an executor or administrator has neglected or refused to return an inventory. (*Id.* 164, § 58, 5th ed.)

The proceedings against an executor or administrator to compel

him to return an inventory, belongs more appropriately to a subsequent chapter, where the subject will be treated more at large. At present it is only necessary to say that if an executor or administrator neglects or refuses to return an inventory he may be proceeded against by attachment and commitment to jail until he complies with the order; and in case the executor or administrator after being committed to jail, neglects for thirty days to make and return the inventory, or in case he cannot be served with a summons by reason of his absence or concealment, the surrogate is in either case authorised to issue, under his seal of office, a revocation of the letters testamentary or of administration, reciting therein the cause of such revocation, and to grant letters of administration of the goods, chattels and effects of the deceased unadministered to the person entitled thereto, (other than such executor or administrator) in the same manner as original letters of administration or letters testamentary.

It may sometimes happen, that after letters of administration have been granted, and the administrator has entered upon the duties of his trust, in good faith, a will of the supposed intestate is discovered and admitted to probate. This affords a good ground of calling in and revoking the letters of administration, (2 *R. S.* 78,) and the question will then arise as to the validity of the acts done by the administrator under his appointment. He may have made sales of personal property and paid debts before he had notice of the will. By the statute such acts, done in good faith, by an administrator acting under an appointment of the court, are to remain valid and not to be impeached on the happening of such a contingency. And the same principle is extended to the sales and other lawful acts done by executors or administrators who may be subsequently removed or superseded, or who may become incapable of acting. (3 *R. S.* 165, § 59, 5th ed. *Bloomer v. Bloomer*, 2 *Bradf.* 339.)

There was a distinction, at common law, between a grant of administration which was *void*, and one which was *voidable* merely. If administration was granted, as in cases of intestacy, whereas the testator made a will appointing an executor; or if it be granted by a surrogate having no jurisdiction, the appointment in

these cases, was a mere nullity. But if the court had jurisdiction, and the party died intestate, but the error consisted in making the grant to one not of kin; or without citing necessary parties, or to a stranger, or to a creditor before the renunciation of the next of kin; or the person appointed either was, or became disqualified, the grant was not *void* but *voidable*, and might be repealed. (*Toller*, 121, 122.) The New York statute, it has been seen, sustains the acts in good faith of the administrator, done before notice of the will, though at common law they were void. It places them on the same footing as it does in those cases where the act was merely voidable. But the statute does not extend to a case where the surrogate had no jurisdiction of the subject matter.

At common law, too, the surrogate could not revoke letters testamentary or letters of administration on account of the omission to bring in an inventory. This we have seen may now be done, and of this more will be said hereafter.

SECTION IV.

Of the revocation of probate or letters of administration by appeal, and of the effect of such revocation on the mesne acts of the executor or administrator.

In the two preceding sections we considered the question of recalling probate and superseding letters testamentary and letters of administration, where the same was done by the court by which they were granted. It remains to add a few words on the effect produced by the reversing the decision of the surrogate in granting probate, letters testamentary or letters of administration, by the appellate tribunal.

While the old court of probate was in existence the appeal from the decision of the surrogate was to that tribunal and thence to the court for the correction of errors. On the abolition of that court, appeals were directed to be made to the court of chancery; and afterwards in some cases to a circuit judge, and in others to the supreme court. By the existing law, all appeals which may be taken from the decision of surrogates' courts, either in admitting a will to probate or in refusing to do so, are required to be made to the

supreme court. By the act of 1847, chapter 280, § 17, (3 *R. S.* 906, 5th ed.,) appeals are permitted to be made from the orders, decrees and sentences of surrogates, *in all cases*, to the supreme court. This, of course, embraces appeals from an order granting administration, or revoking letters testamentary or letters of administration. The statute prescribes the bond which is necessary to be given by the appellant in order to render the appeal effectual, and then enacts that every such appeal, except in certain specified cases, shall suspend all proceedings on the order appealed from, until such appeal be determined, or until the court to which the appeal shall have been made, shall authorize proceedings thereon. (3 *R. S.* 906, 5th ed.)

The intermediate acts of the executor or administrator, pending the appeal after notice, are necessarily void, except in the specified cases. The cases thus excepted from the general rule are 1st, appeals from the order appointing a collector or special administrator of the estate of a deceased person ; 2d, from orders directing the sale of perishable property ; 3d, from orders appointing appraisers of personal property ; 4th, from all orders for the service and publication of notices ; 5th, appeals from orders for the commitment of any executor, administrator or guardian, for not returning an inventory, rendering an account or obeying any other order of a surrogate. And appeals from such orders for the commitment of any person refusing to obey any subpoena, or to testify when required according to law, shall not stay the execution of such order or process, unless the party committed shall give bond as directed by law. (*Id.* 906, 907, 5th ed.)

In all other cases, the executor or administrator, on receiving notice of appeal, must refrain from doing any act which he is not expressly allowed to perform. But the acts which he may have done, as executor or administrator, prior to the appeal, if done in good faith, in the ordinary course of administration, cannot be rendered invalid or be impeached by the subsequent reversal of the order by which he was appointed. The consequences of the reversal on appeal, with respect to such acts, are the same as if the order had been merely revoked by the surrogate himself.

The time within which an appeal may be taken to a decree or order of the surrogate court is limited by statute in some cases, to

three months, and in others to thirty days from the day on which the decree was made. (3 *R. S.* 905, 906, 5th ed.) But there is no like provision limiting the period within which proceedings may be instituted before the surrogate to revoke letters testamentary or of administration. If the affairs of the estate are brought to a close within the period contemplated by law, or indeed at any time, there would be no person having an interest to call on the surrogate for a removal. Nor would any benefit result to any one from a supersedeas of the letters. But suppose, as sometimes happens, the estate remains for many years in the hands of the executor or administrator, unadministered, surely this delay in closing the settlement of the estate, would not deprive the court of the power, in a proper case, to displace the executors or administrators. The argument from delay in making the application to the surrogate for a supersedeas, when the application arises out of the misconduct of the parties complained of, is without any force, unless the parties interested in the estate were of full age, and capable of acting, and well apprised of the facts on which the motion is founded.

CHAPTER X.

OF THE INVENTORY.

The duty of an executor or administrator to make and return an inventory of the goods and chattels, rights and credits of the deceased, can only be enforced in this state by the surrogates' courts. Those courts have, in this state, an original and exclusive jurisdiction over the practice in this respect, the consideration of which appropriately belongs to the second part of this treatise. The nature and quality of the estate of an executor or administrator, in the personal effects of the deceased, and the powers and duties of the executor or administrator, with respect to them, do not *exclusively* belong to surrogates' courts, although often the subject of discussion in those courts. Courts of common law and equity jurisdiction are more frequently called upon to consider these rights and duties than surrogates' courts. The jurisdiction of the former is more ample than that of the latter with respect to these

subjects ; though within certain limits their jurisdiction is concurrent. For these reasons it has been thought best to postpone, until we come to the third part of this treatise, the consideration of the questions in which all our courts are concerned ; and treat only in this part of those matters which belong in the first instance to surrogates' courts, as courts of exclusive original jurisdiction.

SECTION I.

Of the ancient practice on the subject of inventories.

It is difficult to understand, in a correct and scientific manner, the present practice on the subject of making and returning an inventory of the personal estate of the deceased, as it is modified by the existing statutes of this state, without possessing a general view of the course anciently pursued in discharging this part of the duties of an executor or administrator.

An inventory was required to be returned, as a part of the canon law, prior to any statute. (2 *Burn's E. L. quarto ed.* 644.) Thus, by a constitution of Othobon, it was ordained, "That the executors of testaments, before they shall intermeddle with the administration of the goods, shall make an inventory in the presence of some credible persons, who shall competently understand the value of the deceased's goods ; and the same shall exhibit unto the ordinary, and if any shall presume to administer, without such inventory made, he shall be punished by the discretion of his ordinary."

And by a constitution of Archbishop Stratford, (*see Burn, supra*,) it is ordered as follows : "We do enjoin, that no executor of any testament shall be permitted to administer of his testator's goods, unless he first makes a faithful inventory of the said goods ; the funeral expenses and the expenses about the inventory only excepted. And the same inventory shall be delivered to the ordinary at a time to be appointed at his discretion."

At a subsequent period, but in affirmance of the ecclesiastical law, (*Toller*, 247,) the statute, 21 Henry 8, ch. 5, was passed. The 4th section of that statute is as follows : "The executor and executors named by the testator or person deceased, or such other person or persons to whom administration shall be commit-

ted, where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the person so dying was indebted, or made any legacy ; and upon their refusal or absence, two other honest persons, being next of kin to the person so dying ; and in their default and absence, two other honest persons ; and in their presence, and by their directions, shall make or cause to be made a true and perfect inventory of all the goods, chattels, wares, merchandises, as well movable as not movable, whatsoever, that were of said person so deceased, and the same shall cause to be indented ; whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths, to be taken before the said bishop or ordinary, their officials or commissaries, or other persons having power to take probate or testament, to be good and true, delivered into the keeping of the said bishop or ordinary, or other person as aforesaid, and the other part thereof to remain with the said executor or executors, administrator or administrators. *And no bishop, ordinary, or other whatsoever person, having authority to take probate of testaments, on pain in this statute contained, shall refuse to take such inventory, to him presented or tendered, to be delivered as aforesaid."*

This statute was substantially re-enacted in this state in 1787, (1 *Greenl.* 335, § 11,) substituting judge of probate and surrogate for bishop or ordinary, or other officer, and was continued, without alteration, in the revision of 1801 and 1813, (1 *K. & R.* 535, § 1. 1 *R. L.* of 1813, 311, § 1,) except in the latter statutes, the time within which the inventory was to be exhibited was fixed at six months, and the last sentence in the British act, printed in italics, was omitted in all.

The old practice of the prerogative court of Canterbury was to require an inventory to be exhibited *before* probate, or letters of administration granted. (2 *Burn's H. L.* 644. *Phillips v. Bignell*, 1 *Phill.* 240.) This, however, did not supersede the necessity of another inventory in conformity to the statutes. (*Id.*)

The ancient ecclesiastical law was very strict with respect to the making of inventories ; and the consequence of neglecting to make one, seems to have been to prevent the executor or administrator

from relying on want of assets. (*Swinb. pt. 3, § 17, pl. 8.*) Even the temporal courts formerly considered the neglect of this duty in a light unfavorable to the party, especially where there was a deficiency of assets; and although not conclusive on him, yet exposing him to imputation. (*Orr v. Kaines, 2 Ves. sen. 193.*)

The object of making an inventory, is to apprise creditors, legatees and parties, in distribution, of the condition of the estate. The modern English practice is, therefore, not to exhibit an inventory in the first instance. The executor or administrator usually waits till he is cited for that purpose in the spiritual court, at the instance of some party interested. (*Phillips v. Bignell, supra. Toller, 250. In the goods of Williams, 3 Hagg. 217.*) It was, however, deemed most prudent, in all cases, for the executor or administrator, in order to exonerate himself, to exhibit it previous to a final settlement. (*Kenny v. Jackson, 1 Hagg. 106.*) A probable or contingent interest, and, in one case, it was said the *appearance* of an interest was sufficient to entitle a party to call for an inventory. (*Phillips v. Bignell, supra.*) In this state, under the former law, in an action on an administration bond, where the plaintiff assigned as a breach the non-return of an inventory, and it not appearing that any injury resulted from the omission, the supreme court directed the assignment to be struck out. (*The People v. McDonald, 1 Cowen, 189.*)

Where an inventory was made, it was required to contain a full, true and perfect description and estimate of all the chattels, real and personal, in possession and in action, to which the executor or administrator was entitled in that character as distinguished from the heir, the widow, and the *donee mortis causa*, of the testator or intestate. (*Toller, 248. 2 Wms. Ex'rs, 841.*) It distinguished such debts as were sperate from those which were doubtful. And it was exhibited under a special oath, the former general oath of the executor or administrator not being deemed sufficient. It contained nothing except what the deceased possessed at his death. The subsequent profits of the business of the deceased were not to be included. (*Pitt v. Woodham, 1 Hagg, 247.*)

It was long a contest in the English courts, and may, perhaps, yet be considered undecided, whether the spiritual court acted *ministerially* or *judicially* in receiving an inventory. The spirit-

ual courts have long claimed the right, and still insist on the power, of entertaining objections to an inventory on the ground of *omissions*, at the instance of a creditor or legatee. (*Tilford v. Morison*, 2 *Add.* 319, 329. (*Butler v. Butler*, 2 *Phill.* 37.) This claim is denied by the courts of Westminster Hall, on the ground that the receiving an inventory is a mere *ministerial* act, and when delivered into court, the ordinary is bound by the statute to receive it, and his power over the subject is exhausted. (5 *M. & S.* 406. 3 *Burrow*, 1922.) The clause in the English statute of Henry 8, which gives rise to this controversy, has never been adopted in this state, and was omitted, it has been seen, in our act of 1787. It is probable, therefore, that prior to the revised statutes, the surrogates had power, in a proper case, to compel a further inventory, or to supply omissions. The revised statutes, it will be seen, in the next section, have provided for the case.

An inventory exhibited by an executor or administrator has always been considered as evidence of assets. If the debts are not distinguished as desperate or doubtful, they are all presumed to be good, and the onus is cast upon the executor or administrator to prove that they could not with reasonable diligence be collected. But the inventory has never been held as conclusive evidence either for or against the executor or administrator, either in England or in this state. (*Bull. N. P.* 140. *Schw. N. P.* 712. *Willoughby v. McCluer*, 2 *Wend.* 608.)

Sometimes, it is said, that before granting letters testamentary or of administration, instead of an inventory of the personal property of the deceased, the court, at the instance of some person having an interest, would issue a commission for the appraisement and true valuation of the goods, rights and credits of the deceased, and an inspection of the obligations, leases, and other writings and papers concerning his personal estate, at his late dwelling house or elsewhere, on certain days and places as should be needful. In such cases there usually issued a monition against the parties having possession of the said property and documents, that they exhibit and show them to the appraisers so appointed, to the end that they might be appraised and put in an inventory. The commissioners appointed for this purpose, returned this inventory to the court, under their oath. (2 *Burn's E. Law*, quarto ed. 652, 653, 654.) (App. No. 58, 59, 60, 61.)

The object of this proceeding was to guide the discretion of the court as to the amount of bail that should be required, when letters came to be granted. It moreover furnished materials for the executors or administrators, after their appointment, of the extent and nature of the estate which they were to administer. This did not supersede the necessity for an inventory to be subsequently called for from the executors or administrators.

Although this proceeding is rarely ever necessary, occasions may arise when a resort to it may be the only means of obtaining the requisite preliminary knowledge of the estate.

SECTION II.

Of the present practice of making and returning an inventory by the revised statutes, and herein of the appointment of appraisers, their power and duties.

The principal object of an inventory is to exhibit, in a convenient form, to all persons interested in the estate of the deceased, that portion of the personal property which is assets in the hands of the executors or administrators, for the payment of debts, and legacies, in distinction from that which is real property and descends to the heirs. To accomplish this, such articles of personal property as are exempt by law and which belong to the widow and minor children and are not assets, must be contained in the inventory, by themselves, without being appraised as assets.

The first step towards making an inventory is to procure the appointment of appraisers. The former law required that legatees, creditors or next of kin should be appraisers, and they were selected by the executors or administrators. This was sometimes inconvenient and often led to disputes. The legislature, at the revision in 1830, changed the rule in this respect, and required the surrogate, instead of the executors or administrators, to make the appointment, by an instrument in writing, and restricted his choice to two disinterested persons, and gave them a reasonable compensation to be allowed by the surrogate. (2 R. S. 82. 3 R. S. 168, 5th ed.) This appointment is made upon the application of the executors or administrators, though not upon their nomination. The appraisers are the officers of the court, and are required before proceeding to the

execution of their duty to take and subscribe an oath, to be inserted in the inventory made by them, before any officer authorized to administer oaths, that they will truly, honestly, and impartially appraise the personal property, which shall be exhibited to them, according to the best of their knowledge and ability. (*Id.* § 4. *Applegate v. Cameron*, 2 *Bradf.* 119.) (App. 51, 52, 53.)

In making the appointment of appraisers, the surrogate should select men of integrity and judgment, who would not collude with one party or the other, and who would be likely to be impartial. In the country where the parties are all known to the surrogate or where their characters can be easily ascertained, the appointment is often made in an informal way, on consultation with the executors or administrators, and some of the parties interested in the estate. But in strictness it should be made with as much care as the appointment of referees is made by courts of record. The order for the appointment is the subject of appeal to the supreme court, if made within thirty days after granting the order. (3 *R. S.* 906, §§ 25, 28, 5th ed.)

The appraisers are in some measure under the control of the surrogate, and may doubtless be removed by him and others appointed in their place, if there be a reasonable and adequate cause.

This, though not expressly stated, is fairly inferable from the general jurisdiction of the surrogate over the inventory, and the conduct of the executors and administrators. There is the same authority for the power as there is for that of courts of record over the appointment of referees. It is an incident of every court of original general jurisdiction. Neither a creditor, a legatee or next of kin, though formerly preferred for this purpose, is now eligible to this office.

The statute we are considering does not announce the principle on which the appraisal should be made, except that it should be truly, honestly and impartially done. The personal property of deceased persons, in the hands of their representatives, is liable to taxation, after deducting the just debts of the estate. The principle which guides the assessors will afford a convenient rule for the appraisers. It is that the estate liable to taxation shall be estimated and assessed by the assessors at its full value, as they

would appraise the same in payment of a just debt due from a solvent debtor. (*L. of 1851, ch. 176, § 3. 3 R. S. 911, 5th ed. § 15.*)

The statute evidently contemplates that the executors and administrators shall within a reasonable time after qualifying, with the aid of the appraisers appointed by the surrogate, make a true and perfect inventory of all the goods, chattels and credits of the testator or intestate, and when the same shall be in different and distant places, two or more such inventories, as shall be necessary. Notice of the time and place of making the appraisal is to be served five days previous thereto on the legatees and next of kin residing in the county where the property shall be; and it is required also to be posted in three of the most public places of the town. (*Id. §§ 3, 4.*) What is a reasonable time will depend on the circumstances of each case. As the inventory is required to be returned to the surrogate, and attested by the oath of the executors or administrators within three months from the date of their letters, unless the surrogate, for reasonable cause, allows a further time, not exceeding four months, (*compare §§ 16 and 19, 3 R. S. 171, 172, 5th ed.,*) it is obvious that it should be done as soon as convenience will permit, and that the surrogate in receiving the inventory acts *judicially* and not *ministerially*.

There are several circumstances connected with the taking of the inventory, that require the exercise of a sound and wise discretion of the surrogate. The mode of service of the notice, in case any of the legatees and next of kin are infants, and whether guardians ad litem should be appointed for such, are not particularly specified in the act. On general principles it should seem, that guardians ad litem should be appointed for such infants as have no guardians. Every court, it is said, has an incidental power to appoint a guardian ad litem, and in many cases, the general guardian will not be received as of course, without a special order for the purpose. (*3 Kent's Com. 229. Harg. n. 70, and note 220 to lib. 2 Co. Lit.*)

The statute contemplates that the appraisement shall be made in the presence of such of the next of kin, legatees or creditors of the testator or intestate as shall attend. (*3 R. S. 169, § 5, 5th ed.*) Their right to attend presupposes their right to be heard in case

any question should arise in which they have an interest. There are many questions of great importance, which may arise during the performance of this duty. The appraisers are to act upon the property which is exhibited to them. It is their business to set down each article separately, and to fix its value in dollars and cents, and set it down distinctly in figures opposite to the articles respectively. (*Id.* § 5.)

It is of the greatest importance to all persons interested in the estate, that it should be accurately known what portion of it goes to the heirs as real property, and what to the executors and administrators as assets for the payment of debts and legacies, to be distributed to the relatives entitled under the statute of distributions. To determine this question it is first necessary to notice the exceptions in favor of the widow and minor children. These excepted articles are to be inserted in the inventory, without appraisal. At common law the widow was entitled to *bona paraphernalia*, to the exclusion of the executor, but on a deficiency of assets, they were subject to the payment of the husband's debts, except as far as her necessary apparel. Her claim, however, was preferred to a legatee of the husband. (1 *Wms. Ex'rs*, 646, 7. 2 *Burn's E. L.* 649.) It is believed to have been the intention of the legislature to include the *paraphernalia* in the exception which will now be considered. The statute is as follows, though parts of it were enacted at different times, commencing as early as 1824, and ending in 1842. "Where a man having a family shall die, leaving a widow, or a minor child or children, the following articles shall not be deemed assets, but shall be included and stated in the inventory of the estate, without being appraised.

1. All spinning wheels, weaving looms and stoves put up and kept for use by his family ;

2. The family bible, family pictures and school books used by or in the family of such deceased person ; and books not exceeding in value fifty dollars, which were kept and used as part of the family library, before the decease of such person ;

3. All sheep to the number of ten, with their fleeces, and the yarn and cloth manufactured from the same ; one cow ; two swine, and the pork of such swine ;

4. All necessary wearing apparel, beds, bedsteads and bed-

ding; necessary cooking utensils; the clothing of the family; the clothes of a widow, and her ornaments proper for her station; one table, six chairs, six knives and forks, six plates, six teacups and saucers, one sugar dish, one milk pot, one teapot and six spoons.

The said articles shall remain in the possession of the widow, if there be one, during the time she shall live with and provide for such minor child or children. When she shall cease to do so, she shall be allowed to retain as her own, her wearing apparel, her ornaments and one bed, bedstead and the bedding for the same; and the other articles so exempted shall then belong to such minor child or children. If there be a widow and no such minor child, then the said articles shall belong to such widow.

When a man having a family shall die leaving a widow or minor child or children, these shall be inventoried by the appraisers and set apart for the use of such widow and child or children, or for the use of such child or children, in the manner above provided, necessary household furniture, provisions, or other personal property, in the discretion of said appraisers, to the value of not exceeding one hundred and fifty dollars, in addition to the articles of personal property now exempt from appraisal, by the foregoing section." (3 R. S. 170, §§ 9, 11, 5th ed.)

The reason for inserting the exempted articles in the inventory is to afford documentary evidence of the proper disposition of the estate, and of the title of the parties to whom those articles belong. The property thus set apart without appraisal is not subject to taxation against the estate of the deceased.

The provisions of the foregoing statute are not limited to cases where the deceased was a resident of this state. Thus, where the intestate died on his way to this country, leaving a widow and minor children in Germany, and the assets left on board the vessel came into the hands of the public administrator, nothing having been set apart in the inventory for the widow and children, it was held by the surrogate of New York, that the inventory should be reformed in that respect. (*Kapp v. The Public Administrator*, 2 Bradf. 258.)

Nor is it material whether the widow is the actual mother of the minor children; if she be the stepmother, and she is able and willing to keep up the family circle and provide suitably for the

minor children, she is entitled to hold the exempt articles; and the minor children who leave her, contrary to her wishes, and without any fault on her part, are not entitled to take those articles from her. (*Scofield v. Scofield*, 6 *Hill*, 642.)

The claim of the widow under the exemption laws, does not depend on the question whether she be the mother of children or not, or whether her deceased husband left children, which formed a part of the family, at his decease. A man who has a wife and other relatives residing with him at the time of his death, besides servants, although without children, leaves a family within the meaning of the act. (*Kain v. Fisher*, 2 *Seld.* 597.)

Nor have the appraisers, under the act of 1842, which is the last section cited from the revised statutes, a *discretion* to withhold setting apart the furniture and provisions to the value of one hundred and fifty dollars, if there be that amount in value belonging to the estate. As they have no right to deal unjustly to the other parties interested in the estate, such as creditors, legatees or next of kin, by setting apart for the widow, or minor children, articles exceeding in value the one hundred and fifty dollars, so they are not warranted in refusing altogether to set apart any thing. Their appraisement is not conclusive, but may be reviewed, examined and corrected, whether the error be in favor of the widow or against her. (*Applegate v. Cameron*, 2 *Bradf.* 119. *Sheldon v. Bliss*, 4 *Seld.* 31.) The discretion of the appraisers is not an arbitrary but a *judicial* discretion. It has reference mainly to the articles to be inventoried and set apart to the widow, and can never be referable to the amount when the personal property left by the deceased, exceeds in value one hundred and fifty dollars. (*Id.*) If there be various articles of the same kind belonging to the estate, the appraisers have a discretion, which to set apart, not exceeding the specified value. Or they may, it is conceived, if the condition of the estate will warrant it, set off to her the one hundred and fifty dollars in money, in lieu of those articles, or a portion in furniture or other articles, and the residue in money. (*Dayton's Surrogate*, 250.) The discretion of the appraisers may be controlled by the surrogate, if it has been unreasonably exercised.

The widow and minor children have by the death of the testator or intestate, a mere naked right to the exempt articles. The legal

title vests in the personal representatives, by relation, from the time of the death of their former owner. Hence, before the articles are set apart by the appraisers, the legal title is in the executors or administrators, and no action will lie at the suit of the widow against the executors or administrators for taking possession of them. (*Voelckner v. Hudson*, 1 Sand. S. C. R. 215.) The executors or administrators are bound to take possession of the personal estate, and the appraisers can only inventory such as is exhibited to them by those parties. (2 R. S. 8, § 82.) When the exempted articles are set apart in the inventory by the appraisers, what was before a *mere right* ripens into a perfect title, and whoever subsequently interferes with the property without the consent of the owner becomes a trespasser.

It is not usual for the executors or administrators to dispossess the widow and family of these exempt articles antecedent to taking the inventory. They are usually left with the family till the inventory is taken. It is not perceived that the executors or administrators incur any risk in doing so.

If the executors refuse to set off to the widow the articles exempt under the statute, and convert into money the articles contained in the inventory, the surrogate has the power to order them to pay the widow a sum of money in lieu of what she was entitled to receive under the exemption laws. (*Bliss v. Sheldon*, 7 Barb. 152, *affirmed*, 4 Seld. 31.) The power conferred upon the surrogate by the revised statutes, (2 R. S. 154, *subd.* 3,) *to direct and control the conduct*, and settle the accounts of executors and administrators, is deemed ample authority for that officer to interfere in that manner. The court of appeals held in the last mentioned case, that the proceeds of the sale in the hands of the executors, constituted a trust in favor of the widow, to the extent of her interest in or claim upon the property of the testator under the statute. She might, said Judge Gardiner, affirm the sale, and it would be the duty of the executors, as trustees, to pay over the avails to the legal and equitable proprietor. If they refused, the surrogate in virtue of his power to control their conduct, "and to administer justice, in all matters relating to the affairs of deceased persons," could compel their obedience.

It has sometimes been claimed, on the part of the executors, that the widow is barred of her right to the exempt articles in consequence of a marriage settlement, or some pecuniary provision in the will of the testator. On this subject it is well settled that a provision in the will of a husband in favor of the wife, will never be construed by implication to be in lieu of dower, *or any other interest in his estate given by law*. The design to substitute one for the other must be unequivocally expressed. (*Sheldon v. Bliss*, 4 *Seld.* 35.)

The right to the exempt articles, like a right to dower in the real estate of the husband, is a legal right, and the wife cannot be deprived of it by a testamentary provision in her favor. Nor can she be put to her election between her statute right and a legacy, unless the latter was evidently intended by the testator to be a bar to the former, and that intention is announced in express terms or by necessary implication. (*Willard's Equity Juris.* 546 to 552, *where the cases on election are collected*.) Thus, should the testator bequeath to his wife a bed, or a cow, it would not deprive her of the bed or the cow to which she is entitled by law. If there were cows and beds enough, she would take as well under the will as the statute. In case of a deficiency of assets to pay debts, her legacy must yield to the claims of creditors, but her title, under the statute, is paramount to such a claim. In this, as well as some other respects, the exemption is more favorable to the widow than the common law was to her right to *bona paraphernalia*, which we have seen in some cases, and to some extent, yielded to the demands of her husband's creditors.

The humane provisions in favor of the widow and minor children of a deceased householder, were first introduced into our statute law in 1824, (*L. of 1824, p. 32, ch. 44.*) and were enlarged and improved at the revision of 1830. (*2 R. S.* 83.) They were again expanded in 1842, so as to embrace the additional one hundred and fifty dollars. (*See L. of 1842, ch. 157, § 2.*) Prior to 1824, there was no exemption in favor of the widow, unless her *paraphernalia* be so considered. The exemption of certain articles from sale on execution, and from distress for rent, was made a few years earlier, but all within the present century.

The exemption in favor of the widow and minor children is a

politic as well as benevolent arrangement to provide, as far as practicable, for keeping up the family state during the minority of the children of a deceased father. That state tends in many ways to promote the happiness of the children, and fit them to become useful members of society. The care and counsels of a mother should not be lightly esteemed, either by her offspring or by those who enact the laws. (*Per Bronson, J. in Scofield v. Scofield, supra.*) Similar provisions exist in most of the states. The wisdom of weakening the extreme grasp of the creditor, has been felt in all ages, and is recognized in the Mosaic economy. (*Deuteronomy 24, v. 6.*) Public policy does not require that the articles in question should be yielded to the claims of creditors. No just man ever trusted another, upon the strength of any supposed right of stripping his widow and children, after his death, of the few articles necessary for family comfort and convenience.

With regard to the final disposition of the exempt articles, the statute is explicit. The articles are not deemed assets. They are not, therefore, liable to the claims of the creditors of the deceased. If there be no minor child or children, they then belong to the widow alone, and are subject to her disposition. (*Kain v. Fisher, 2 Seld. 597. 3 R. S. 170, 5th ed.*)

If there be one or more minor children, in that case all the articles are to remain in the possession of the widow during the time she shall live with and provide for such minor child or children. When she ceases to do so, she is allowed to retain, as her own, her wearing apparel, her ornaments, and one bed, bedstead, and the bedding for the same ; and the other articles, so exempted, then belong to the minor child or children. It is obvious that there are many ways in which the widow may cease to live with and provide for the minor child or children. She may *refuse* absolutely to perform this condition, or, agreeing to perform it, she may so conduct herself towards the children that it would be *unsafe* or *improper* for them to live with her. In either of these cases, there can be no reasonable doubt that she would forfeit the provision. (*Scofield v. Scofield, supra.*) She may be willing to reside with the children and make ample and suitable provision for their support, and the children refuse to live with her, and go elsewhere to reside without fault on her part. In such a case the

supreme court thought she was still entitled to retain the articles. (*Id.*)

But suppose the minor child dies while living with and supported by the widow, the question then will arise whether those articles should belong to the widow, or the personal representative of the minor, who may be a different person from the widow, if she was the stepmother. The answer to this question turns upon the inquiry, whether the contingency of there being no minor child has reference to the time of the death of the testator or intestate, or is indefinite in its application. In the latter case, the articles would belong to the widow.

The statute does not state what becomes of the articles, where the minors having lived with and been supported by the widow, during their minority, become of age and voluntarily leave her, without fault on her part. The contingency when they shall belong to the minor child or children happens only when, *during their minority*, they cease, without their own fault, from being members of her family. Though this question has not yet been decided to my knowledge, and it therefore becomes us to anticipate, with diffidence, the ultimate judgment of the courts upon it, it is nevertheless believed that if the widow still continues to keep house after the minors become of age, and has not forfeited her right by previous misconduct, she is still entitled to the possession of the property. It is not probable that the legislature intended to break up the family when the children became of age. (*See Scofield v. Scofield, supra.*) Although the title of the widow is a defeasible one, it is inferrible from what was said by the court in the last mentioned case, that it can only be defeated by some wrongful act on her part.

On the death of the widow, or the minor children during their minority or afterwards, the exempt articles do not fall back into the estate of the deceased husband, but go to the personal representatives of their last owner. (For forms in taking the inventory, see Appendix, 55, 56.)

Having thus noticed, sufficiently at large, the subject of the exempt articles, and which it will be remembered are not assets of the deceased husband, but are to be included and stated in the

inventory of the estate, without being appraised, we proceed to notice the further steps to be taken by the executors or administrators, and the appraisers. At the time and place appointed in the notice, and it is presumed at such subsequent times and places as shall be appointed by adjournment, the appraisers, in the presence of such of the next of kin, legatees or creditors of the testator or intestate as shall attend, proceed to estimate and appraise the property which shall be exhibited to them, by the executors or administrators, or under their direction, and are required to set down each article separately, with the value thereof in dollars and cents, distinctly in figures, opposite to the articles respectively. (2 *R. S.* 82, § 5. 3 *R. S.* 169, 5th ed.)

The requirement that each article must be separately stated and appraised, must have a reasonable interpretation. Such articles as are usually kept together, and where there is a conventional unity of several things of the same sort, should be stated together. Thus, a yoke of oxen, a span of horses, for example, when matched and generally kept together, the several volumes of the same work, and the like, should be appraised in the same way in which they were treated in the family of the deceased. The law does not require the breaking up of such conventional arrangements. Though, in the sale of these articles, the executors and administrators must consult the interest of the estate, and are not forbidden to separate matched horses or oxen, if the sale of each separately will be most advantageous to the estate.

Previous to the adoption of the revised statutes in 1830, there was some uncertainty in the law, and a fluctuation in the decisions as to the relative rights of the executors or administrators, on the one hand, and the heirs at law on the other, with respect to annexations to the freehold. There was supposed to be a distinction, in relation to what belonged to the realty, as between landlord and tenant, and as between the heir at law and the personal representative. It was also supposed that the outgoing tenant might be permitted to remove fixtures of a particular description, placed by him upon the premises for a special purpose, which as between the heirs at law and the personal representatives of the owner of the freehold would have descended to the heirs. (*House v. House*, 10 *Paige*, 163.)

The legislature intended to put the executor or administrator upon the same footing with a tenant as to the rights to fixtures. And they intended to settle some other questions, and give more symmetry to the law. They, therefore, enacted certain legal propositions, derived from the decisions of the courts and the elementary writers, which it was supposed would remove all disputes for the future. (*See Revisers' notes, 3 R. S. 638, 639, 2d ed.*) These propositions as enacted, assumed the following form :

“The following property, it was enacted, shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of their testator or intestate, and shall be included in the inventory thereof.

1. Leases for years ; lands held by the deceased from year to year ; and estates held by him for the life of another person ;

2. The interest which may remain in the deceased at the time of his death, in a term for years, after the expiration of any estate for years therein, granted by him or any other person ;

3. The interest in lands devised to an executor for a term of years, for the payment of debts ;

4. Things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support ;

5. The crops growing on the land of the deceased at the time of his death ;

6. Every kind of produce raised annually by labor and cultivation, excepting grass growing and fruit not gathered ;

7. Rent reserved to the deceased, which had accrued at the time of his death ;

8. Debts secured by mortgages, bonds, notes or bills ; accounts, money and bank bills, or other circulating medium, things in action and stock in any company, whether incorporated or not ;

9. Goods, wares, merchandise, utensils, furniture, cattle, provisions, and every other species of personal property and effects, not hereafter excepted.” (*See 2 R. S. 82, § 6.*)

Having thus enacted what are assets, it proceeded to declare, in general terms, what are not. Thus, § 7 : Things annexed to the freehold or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except

such fixtures as are mentioned in the fourth subdivision of the last section. And, by way of greater caution, they added § 8: The right of an heir to any property, not enumerated in the preceding sixth section, which, by the common law would descend to him, shall not be impaired by the general terms of that section.

Although the foregoing specifications were drawn by learned men, with great care, yet it has already been found that numerous questions arise calling for judicial construction, and an occasional resort to the old authorities for illustration is found to be necessary. It is impossible, from the imperfection of human language, and the constant fluctuation in the affairs of an active and enlightened community, to anticipate every difficulty, and to guard against it.

In *House v. House*, (10 *Paige*, 162, 164,) the administrators claimed the mill stones, bolts and other machinery in a flouring mill, as personal estate, under the 4th subdivision above specified, considering them as not essential to the support of the walls of the mill. By an extremely literal construction of the act, it would be difficult to resist the claim upon that ground, and, perhaps, different courts might arrive at different conclusions on the subject. But it was held, and probably rightly, that fixtures of this character are not only convenient but essential to the proper enjoyment of the inheritance; and are, therefore, as much a part of the freehold as the building and water power, which, with them, constitute the mill. The owner of a pew in a church may, and often does, have a lease of it, in which he is bound to pay certain rent, and, perhaps, other assessments. The question has arisen whether the interest in the pew goes to the executors or administrators, or descends as real estate to the heirs at law. The peculiar quality of that species of property has often been the subject of investigation in our courts, and the weight of argument, as well as authority, seems to be in favor of considering the right to the pew as a right indeterminate as to its duration; and springing out of the land, and so belonging to the heir rather than the personal representatives. (*Matter of Havens*, 4 *Bradf.* 7, where the cases are collected and reviewed.)

Grass growing, and fruit not gathered, at the death of the testator, go to the heir and not the personal representatives. This

is made an exception to the general proposition, that the growing crops belong to the personalty. (*Kain v. Fisher*, 2 *Seld.* 597.)

The statute contains some practical directions with respect to the manner of stating the assets. Thus, it is required that the inventory shall contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money belonging to the deceased, which are known to the executor or administrator, specifying the name of the debtor in each security; the date; the sum originally payable; the indorsements thereon, if any, with the dates; *and the sum which, in the judgment of the appraisers, may be collectable on each security.* (2 *R. S.* 84, § 11.) This is a substitute for the requirement at common law, to distinguish debts which are *sperate* from those which are *doubtful* or *desperate*. (*Toller*, 248.) The inventory must also contain an account of all money, whether in specie or bank bills, or other circulating medium belonging to the deceased, which shall have come to the hands of the executor or administrator; and if none shall have come to his hands, that fact must be so stated in the inventory. (2 *R. S.* 84, § 12.)

Formerly the appointment of the testator's debtor as an executor operated as a release of the debt. (*Marvin v. Stone*, 2 *Cowen*, 809. *Gardner v. Miller*, 19 *John.* 188.) The discharge was *implied* from the act of appointment. This rule is now abrogated. The claim which the testator had against the executor, must be included among the credits and effects of the deceased, in the inventory, and the executor is made liable for the same, as for so much money in his hands, at the time such debt or demand becomes due; and he is required to distribute the same in the payment of debts and legacies, and amongst the next of kin, as part of the personal estate of the deceased. (*Id.* § 13.)

But the foregoing section does not *apply* to an *express* discharge by the testator of any debt or demand which he may have against the executor or any other person. At common law, it was competent for the testator to discharge such claim by an *express* provision in his will. This has been changed by the revised statutes, and it is enacted that such discharge shall not be valid as against the creditors of the deceased; but shall be construed only as a specific bequest of such debt or demand; and the amount thereof

is required to be included in the inventory of the credits and effects of the deceased, and shall, if necessary, be applied to the payment of his debts ; and if necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies. (*Id.* § 14.) The legislature thus adopted as a general rule of law, a principle which equity had always struggled hard to enforce. (*See Gardner v. Miller, supra, and Marvin v. Stone, supra.*)

Upon the completion of the inventory, duplicates of it must be made and signed by the appraisers, one of which is to be retained by the executors or administrators, and the other returned to the surrogate, within three months from the date of the letters testamentary or of administration. The surrogate can, for a reasonable cause, extend the time for returning an inventory, not exceeding four months. The statute requiring an inventory to be returned within a limited time, being directory merely, an inventory made *after* the expiration of the time, is equally valid, and should be received, on being returned to the surrogate.

Upon returning the inventory, the executors or administrators are required to take and subscribe an oath, before the surrogate ; or, if he be absent from the county, or incapable from sickness, or otherwise, of transacting business, or his office be vacant, then before a judge of the county court of such county ; stating that such inventory is in all respects just and true ; that it contains a true statement of all the personal property of the deceased which has come to the knowledge of the executor or administrator, and particularly of all money, bank bills, and other circulating medium belonging to the deceased, and of all just claims of the deceased against such executor or administrator according to the best of his knowledge. (2 *R. S.* 85.) This oath must be indorsed upon or annexed to the inventory, and the latter must be filed by the surrogate and preserved among the papers of his office. By a subsequent law, the oath of office of executors and administrators, and the oath of the appraisers, administrators and executors, in relation to the inventory, are permitted to be administered by the surrogate, or by any commissioner of deeds, or judge of the county courts. (*L. of* 1837, *ch.* 460, § 59. 3 *R. S.* 171, § 18.) For form of oath, see Appendix, No. 57.)

SECTION III.

Of the method of compelling a return of an inventory when the executor or administrator omits that duty, and herein of compelling a further inventory.

In general it is a fair presumption that executors and administrators will discharge the duty imposed upon them by law, of taking and returning an inventory. They will be led to do it as well from a regard to their own safety, as from their respect to the injunctions of law. It was, however, foreseen that occasions might arise, when this duty might be neglected. It is accordingly provided that if an executor or administrator shall neglect or refuse to return an inventory, within the time allowed for that purpose, the surrogate shall issue a summons requiring him at a short day, therein to be appointed, to appear before him and return an inventory according to law, or show cause why an attachment should not be issued against him. (2 R. S. 85, § 17.)

From the imperative language of the section it would seem that the surrogate can issue this summons on his own motion, without an application from a party having an interest in the estate. It is said by Sir John Nicholl in *Phillips v. Vignel*, (1 Phill. 240,) that the prerogative court may, and in some instances does, for the protection and security of the parties interested, require, *ex officio*, an inventory to be exhibited; and although the court does not exact this, in all cases, still it always will, when the party having an interest in the property applies for it. In *Thomson v. Thomson*, (1 Bradf. 24,) the surrogate of the city and county of New York held to the same doctrine. Although admitting his power, on his own motion, to enforce the return of an inventory, after three months from the issue of letters, he admitted that it was not usual to do so, unless at the intervention of a party in interest.

The time limited for the return of such summons, and the number of days service, previous to its return, are left to the discretion of the surrogate. The time between the service and the return should be sufficiently long to enable the executors or ad-

ministrators to give the requisite notices and to take the inventory. Like other process, the attachment must be founded upon an order, entered in the minute book; be issued under the seal of the court; and be tested in the name of the officer by whom it is issued. (2 R. S. 222.) The attachment may be issued to any county in the state, and may be executed in any other county, as well as that where the surrogate resides. (*The People v. Pelham*, 14 Wend. 48.)

Although the 18th section provides that the surrogate shall issue an attachment against the executor or administrator, if after personal service of such summons he shall not, by the day appointed, return the inventory on oath, or obtain further time to return the same, and commit him to the common jail of the county, there to remain until he shall return the said inventory, it is still obvious that the defaulting executor or administrator is entitled to show cause against such order. He may show that the party on whose motion the attachment is issued has no interest in the estate, either as creditor, legatee or next of kin. If the estate has been settled to the satisfaction of the parties interested in it, the court will not order an inventory to gratify the idle curiosity of any body. So lapse of time sufficient to raise the presumption that the estate has been fully administered will be a sufficient answer to the application. (*Thomson v. Thomson*, 1 Bradf. 24. *Bowles v. Harvey*, 4 Hagg. 241. *Higgins v. Higgins*, 4 id. 242.)

If the defaulting executor or administrator fails to show any cause, or sufficient cause to the contrary, the alternative in the attachment requires him to be committed to the common jail of the county, there to remain until he shall return such inventory. (2 R. S. 85.) A party thus committed is not entitled to the liberty of the yard, but must be kept in close custody. He is, however, entitled to be discharged by the surrogate or a justice of the supreme court on his delivering upon oath, all the property of the deceased under his control, to such person as shall be authorized by the surrogate to receive it. (3 R. S. 172, § 24, 5th ed.)

Should it happen that the summons cannot be served personally by reason of the executor or administrator absconding or concealing himself, or if after being committed to prison, the executor or administrator shall neglect for thirty days to make and return such inven-

tory, the surrogate is then authorized to issue, under his seal of office, a revocation of the letters testamentary or letters of administration, before granted, reciting therein the cause of such revocation, and to grant letters of administration of the goods, chattels and effects of the deceased, unadministered, to the person entitled thereto (other than such executor or administrator) in the same manner as original letters of administration or letters testamentary. (2 R. S. 85, § 19.) The effect of this grant will be to supersede all former letters, and to deprive the former executor or administrator of all power, authority and control over the personal estate of the deceased, and entitle the person so appointed to take, demand and receive the goods and effects of the deceased, wherever the same may be found. (*Id.* § 20.)

The effect of the foregoing enactments is that within the first thirty days after the commitment of the executor or administrator, the defaulting party, on making and returning an inventory, will be entitled to a discharge. If he fails to do so within the thirty days he can no longer do so, but is liable to be superseded, and can then be discharged only on delivering up upon oath the property of the deceased under his control, to the person authorized by the surrogate to receive it. His person cannot be held for the costs; but it is believed these may be obtained by the decree of the surrogate, as in other cases of contest, or by an action upon the administration bond.

The failing to return the inventory as required may have occasioned an injury to the estate of the deceased; the estate may also have sustained injuries by reason of the acts and omissions of the executor or administrator, and by reason of his maladministration. To provide for these contingencies, it is enacted that in every such case of revocation, and whenever directed by the surrogate, the bond given by the former executor or administrator shall be prosecuted, and the money collected thereon be deemed assets in the hands of the person to whom such subsequent letters shall have been issued. (*Id.* § 21.)

The duty of making and returning an inventory is deemed of so much importance that any one or more of the executors or administrators, on the neglect of the others may return it; and those neglecting, are forbidden thereafter to interfere with the adminis-

tration, or have any power over the personal estate of the deceased; but the one so returning an inventory has the whole administration, until the delinquent returns and verifies an inventory according to law. (*Id.* § 23.)

A mere technical breach of duty by not returning an inventory at the day required, unattended with actual damage, will not justify the surrogate in ordering a prosecution of the bond. (*The People v. McDonald*, 2 Cowen, 181.)

It may well happen, that after the making and return of an inventory, personal property or assets of the deceased not mentioned in any inventory already made, may come to the possession or knowledge of the executor or administrator. If his power over the subject were exhausted by making the first inventory, he could neither make or be compelled to make another. But the law has not been thus regardless of the rights of the parties. The executor or administrator, in the case supposed, is required to cause the newly discovered assets to be appraised and an inventory thereof to be made and returned within two months after the discovery of the property; and if he fails to do so, the making of such inventory and return may be enforced, in the same manner as in the case of the first inventory. (2 R. S. 86, § 24.) The proceedings in taking the supplementary inventory are the same, *mutatis mutandis*, as in taking the original inventory; and the mode of compelling such returns will not vary essentially from that pursued in compelling the return of the first inventory. The consequences of neglect and refusal are the same in all cases. These proceedings may be repeated from time to time, as often as additional property may be discovered.

Although in the case of an estate undoubtedly solvent, where all the parties entitled in distribution, as legatees or kindred are of full age, and amicably settle with the executors or administrators their claims against the estate, the return of an inventory need not be compelled, yet it is believed, as a general rule, it is for the interest and safety of the personal representatives to fulfill their duty in this respect, which the statute enjoins. Should it become necessary to resort to the real estate of the deceased to meet unexpected debts, in consequence of the deficiency of personal assets, no application for that purpose can be made to the

surrogate, until *after an inventory of the estate of the deceased shall have been made and returned*. It is better for all parties; that the inventory should be made within the time prescribed by law, than that it should be deferred till a much later period.

Again, the provisions of the act entitled, "Of suits by and against executors and administrators," are predicated on the supposition that an inventory is usually, if not always returned. The 14th section declares the effect of the inventory when given in evidence under a plea of *plene administravit*, making it *prima facie* evidence only, and allowing either party to explain or rebut it by proof. (2 R. S. 447 to 449. *Marre v. Gonochio*, 2 Bradf. 165. *Montgomery v. Dunning*, *Id.* 220.) For forms under this section, see Appendix, No. 62 to 68.)

SECTION IV.

Of collecting the effects, and herein of the power of disposing of them.

It is the duty of an executor or administrator, after having obtained letters and returned an inventory, and, indeed, at an earlier period, to reduce to possession all the effects of the deceased, which belong to the personal representatives. (2 Bl. Com. 510, 512. 2 Kent's Com. 415.) He is to do this with reasonable diligence. He may thus be required to revive judgments obtained by the deceased, in his lifetime, and make himself a party to pending actions. But as these proceedings belong more appropriately to the practice of other courts, and do not appertain to that of surrogates' courts, the reader is referred, for a full consideration of the manner this duty is performed, to works devoted to that subject.

When the executor or administrator discovers that the debts, and, in case of a will, that the legacies cannot be paid without a sale of the personal estate of the deceased, he is required to cause so much of it to be sold as may be necessary. This sale may be public or private, and, except in the city of New York, may be on credit, not exceeding one year, with approved security. The executor or administrator is not responsible for any loss happening on such sale, when made in good faith and with ordinary prudence. (2 R. S. 87, § 25.)

The statute has a wise and benevolent provision, that in making such sales such articles as are not necessary for the support and subsistence of the family of the deceased, or as are not specifically bequeathed, shall be first sold; and articles so bequeathed shall not be sold, until the residue of the personal estate has been applied to the payment of debts. (*Id.* 26.)

It sometimes happens that a doubtful claim will be lost by a too rigid adherence to extreme rights. The hazard may arise from the uncertainty of the facts, or the law of the case, or from the questionable ability of the party against whom it is made. Such cases are now provided for by the act of 1847, ch. 80, § 1. (3 *R. S.* 174, 5th ed.) By this act, executors or administrators may be authorized, by the surrogate or other officer by whom his duties are discharged, in the county where their letters were issued, on application and good and sufficient cause shown therefor, and on such terms as the surrogate or other officer shall approve, to compromise or compound any debt or claim belonging to the estate of their testator or intestate. This proceeding is necessarily *ex parte*, and requires to be carefully watched by the surrogate, lest, by a collusion between the debtor and the executor or administrator, the interest of the estate may be unjustly prejudiced. The statute has therefore properly provided, that nothing therein contained shall prevent any person interested in the final settlement of the estate from showing that such debt or claim was fraudulently or negligently compromised or compounded. (*Id.* § 2.)

The foregoing provisions, although they leave the compromise at the risk of the executor or administrator, in some respects, are a relaxation of the rigor of the law, applicable to persons acting in a fiduciary capacity. In the country, with ordinary care on the part of the executors or administrators, and a reasonable supervision of the surrogate, there will be little danger of loss from a sale on a credit even with personal security.

The right of an executor or administrator to dispose of the personal estate of the deceased, is not limited to the payment of debts and legacies, and is not derived from the 25th section of chapter 6. (2 *R. S.* 87.) It may be necessary to sell the assets in order to make distribution in the cases of intestacy. The object of that section was to prescribe the terms of credit and security, and the manner of selling, as whether it should be public or private. The

right of alienation the executor derives from the will and probate, and the administrator from his appointment; and both, probably, have relation to the time of the death of the testator. The assets are, therefore, at no time without an owner, either actual or by intendment of law. The *jus disponendi* is a necessary incident of ownership, whether such ownership be absolute or in *autre droit*. The property may be of a perishable nature, or it may greatly deteriorate in value if kept until it is wanted for the payment of debts or legacies.

Where there are two or more executors or administrators, either one of them can sell and transfer the property which they hold in that character, and the purchaser who buys it in good faith and for a valuable consideration, can hold it against all the world. (*Bogert v. Hertell*, 4 Hill, 503.)

CHAPTER XI.

OF THE PAYMENT OF THE FUNERAL CHARGES, AND THE ORDER OF PAYING THE OTHER LIABILITIES OF THE ESTATE.

SECTION I.

Of funeral expenses.

The revised statutes recognize, by implication, the common law rule, that the funeral charges are the first lien upon the estate of a deceased person. While the executor is forbidden, before the letters testamentary are granted, to dispose of any part of the estate of the testator, or to interfere with it in any manner further than is necessary for its preservation, an express exception is made in favor of funeral charges. (2 R. S. 71, § 16.) At common law, it is the duty of the executor or administrator to bury the deceased in a manner suitable to the estate which he leaves behind. (2 Blk. Com. 508.) An extravagant expenditure of money, on such an occasion, would be a *devastavit*. The difficulty is to fix upon a rule which will be just towards parties in distribution and creditors, as well as to the memory of the deceased. These expenses are usually incurred when the exact cir-

circumstances of the deceased are not known, and by the relatives or friends of the deceased, before any legal authority has been given to administer on the estate. The account, when incurred in good faith, should be examined with liberality.

A distinction is very properly made between solvent and insolvent estates ; and between cases of intestacy and where the testator has given special directions in his will as to the place and manner of his burial, and the estate being ample to bear the charge. In the latter case, the question will not arise between the executor and a creditor, but between the former and the legatees or kindred.

In *Shelley's case*, before Lord Holt, (1 *Salk.* 296,) the estate was insolvent, and the question arose between the executor and a creditor on a plea of *plene administravit*. His lordship held that in strictness, no funeral expenses are allowable against a creditor except for the coffin, ringing the bell, parson, clerk and bearers' fees, but not for pall and ornaments. Dr. Burn observes, that the expenses of digging the grave and of the shroud should have been added in Shelley's case. A charge for feasts and entertainments is in all cases inadmissible. (*Toller*, 48.) They are incongruous to so mournful an occasion.

Lord Hardwicke, in *Stagg v. Punter*, allowed sixty pounds for the funeral expenses. (3 *Atk.* 119.) The testator had directed his body to be buried at a church thirty miles distant. He had left large sums in legacies, thus affording a reasonable ground for an executor to believe the estate solvent ; and it was not clear that there was any deficiency. His lordship observed, that at law, where a person dies insolvent, the rule is that no more shall be allowed for funeral expenses than is necessary, at first 40s. then £5, and at last £10, but he thought the rule a hard one, even at law, as the executor was frequently obliged to bury the testator before he could possibly know whether the assets were sufficient to pay his debts ; and he said that the court of chancery was not bound down to so strict rules.

In the case of *Hancock v. Podmore*, (1 *Barn. & Adol.* 260,) decided in 1830, issue was taken by a creditor on a plea of *plene administravit*, and it was proved that the assets amounted to £129, and that the executor had paid £55 for probate duty and

£79 for funeral expenses. The court held that it was too much, and intimated that at the present time an allowance of £20 for the funeral of a person of condition might be allowed, as against a creditor. In that case the deceased had been a captain in the army.

It has been made a question whether the erection of a tombstone can be allowed as a funeral expense, as against legatees or parties in distribution. In *Masters v. Masters*, (1 P. Wms. 423,) the testatrix had given two hundred pounds by her will for a monument for her mother, from whom she received most of her estate. It was claimed, as a debt of piety, that it should be paid without abatement, in preference to other legacies, and was allowed by Sir Joseph Jekyl, notwithstanding a deficiency of assets to pay all the general legacies.

The doctrine of the foregoing cases was approved by the chancellor, in *Wood v. Vandenburg*, (6 Paige, 285.) In that case the estate was solvent, but not able to pay all the legacies without an abatement. Nevertheless, the chancellor held that a legacy, for piety, for the erection of headstones at the grave of the testator's parents, or other near relatives, does not abate ratably, and should be paid in full. He held, further, in the same case, that the direction to erect a monument to the testator's own grave, was not a legacy, but was to be considered as a part of the funeral expenses of the deceased, where it did not interfere with the rights of creditors.

The question has sometimes arisen whether, in case the testator or intestate dies at a distance from home, the expense of removing the corpse for burial to the place of his residence, is a proper funeral charge to be allowed. If the deceased gave any directions on the subject in his will, no doubt the expense of obeying them is to be preferred to any legacy or claim of the parties entitled to distribution. If the will be silent on the subject, the case will turn upon the same principle which will govern in the case of intestacy. It is not uncommon, when a death occurs at a distance from the family residence of the deceased, and the season of the year interposes no obstacles, for the corpse to be conveyed for interment to the cemetery which it would have occupied had he died

at home. This is usually desired by the immediate kindred of the deceased, and is, in my judgment, a proper charge, when it does not interfere with the claims of creditors.

Whether mourning furnished the widow and family of a testator is to be allowed, as a funeral expense, as against creditors and legatees, seems to have been decided in the negative in England, in *Johnson v. Baker*, (2 C. & P. 207,) by Best, C. J. In *Bridge v. Brown*, (1 Y. & C. 181,) the question arose between a part of the next of kin and the executors, whether a charge of £20 for tomb stones, and £35 for mourning for the testator's widow and daughters, should be allowed in addition to £100 for funeral expenses, which the master had allowed. On exception to the report, the vice chancellor (Bruce) refused to interfere with the report, and it was confirmed. This case does not in truth settle the question, because the £100 allowed for funeral expenses may have been thought sufficient to cover the expenses for tomb stones and mourning.

In a case where a large part of the estate was given in charity, and the testatrix directed that "any thing not specified she committed to the discretion of her executors," and they expended £93 12s. 6d. for mourning rings to be distributed among the relations and friends of the deceased, Lord Eldon allowed the charge, as being within the discretion of the executors. (*Paice v. The Archbishop of Canterbury*, 14 Vesey, 364.) Here the controversy was not raised by creditors, but the question arose between the donees of the charity and the relatives and friends to whom the mourning rings were given by the executors.

The principle which seems to be deducible from the cases is, that where the estate is large and the claims of creditors do not interfere, the personal representatives are justified in burying the deceased in the style and manner usually adopted for persons of the like rank and condition in society. If the custom of the country is to erect tomb stones at the grave of the deceased, such charge will be justifiable even as against legatees and parties in distribution. But if the deceased was insolvent, although of respectable standing, a funeral corresponding in style to what is usual by the ordinary custom of the country for persons moving in the same

circle, would be allowed. But as tomb stones need not be purchased, until the personal representatives have ascertained the state of the deceased's assets, it is believed they are not a proper charge in any case, as against creditors. Questions of this nature may be essentially affected by provisions in the will of the deceased, and by the general custom of the country.

In some of the states the expenses of the last sickness of the deceased; physicians' bills, and servants' wages are permitted to be first paid; and in Ohio, a sum is allowed for the support of the widow and children for one year. All these exceptions are founded on local statutes, and are dictated by considerations of humanity and benevolence. They have not yet been introduced in this state, but a compensation is found in the liberal exemption in the inventory, which has already been considered. (2, *Kent's Com.* 419, 420, *notes.*)

The next expenses which are to be paid by the executors or administrators are those incidental to the probate of the will, and the obtaining of letters testamentary or letters of administration. These expenses are the regular fees allowed to the surrogate by the fee bill, and in cases of contest, such as shall be taxable according to law. In cases where it shall appear to the surrogate by the oath of the party applying for letters testamentary or of administration, that the goods, chattels and credits of the deceased do not exceed the value of fifty dollars, no fee is receivable by the surrogate. (*Laws of 1844, p. 447, §1. 3 R. S. 921, 5th ed.*) Instances are very rare where it is necessary to obtain letters on so small an estate. If property of the deceased is subsequently discovered, above the value of fifty dollars, it is properly chargeable with the surrogate's fees.

The expenses of the executor or administrator are next to be discharged.

Lastly, the debts of the deceased, which are undisputed, are to be paid. The consideration of disputed claims is postponed until we come to a subsequent chapter, as is also that of the payment of legacies and the distributive shares of the surplus to those who are entitled to it. At present we are to treat of such debts as are not controverted.

In the payment of debts, the common law rule of preference is, to a great extent, abolished by the revised statutes. The order of preference prescribed by the statute is,

1. Debts entitled to a preference under the laws of the United States.

2. Taxes assessed upon the estate of the deceased previous to his death.

3. Judgments docketed, and decrees enrolled against the deceased, according to the priority thereof, respectively.

4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts. (2 *R. S.* 87, § 27.)

We shall discuss these in their order.

SECTION II.

Of debts entitled to a preference under the laws of the United States.

The 5th section of the act of Congress of the 3d March, 1797, entitled an act to provide more effectually for the settlement of accounts between the United States and receivers of public money, provides that where any revenue officer, or other officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority thereby established, is, by the same section, declared to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor, shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed. (2 *L. of U. S.* 594.)

The act of 1799, entitled an act to regulate the collection of duties on imports and tonnage, (3 *L. of U. S.* 136, 197, § 65,) and which is the basis of our revenue laws, provides that in all cases of insolvency, or where any estate in the hands of the executors, administrators or assigns, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States,

on any such bond or bonds, shall be first satisfied; and any executor or administrator, or assignees, or other persons, who shall pay any debt due by the person or estate from whom, or for which they are acting, previous to the debt or debts due to the United States from such persons or estate, being first duly satisfied and paid, shall become answerable, in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid, and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognizance thereof; and it is by the same section also provided, that if the principal, in any bond which shall be given to the United States for duties on goods, wares or merchandise imported, or other penalty, either by himself, his partner or agent, or other person for him, shall be insolvent, or if such principal being deceased, his or her estate or effects, which shall come to the hands of his or her executors, administrators or assignees, shall be insufficient for the payment of his or her debts, and if, in either of the said cases, any surety on the said bond or bonds, or the executors, administrators or assignees of such surety, shall pay to the United States the money due upon such bond or bonds, such surety, his or her executors, administrators or assignees, shall have and enjoy the like advantage, priority or preference, for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the United States; and shall and may bring and maintain a suit, or suits, upon the said bond or bonds, in law or equity, in his, her or their own name, or names, for the recovery of all moneys paid thereon.

In the case of the *United States v. Fisher and others*, (2 *Cranch*, 358,) the question was very fully discussed in the supreme court of the United States, as to the nature and extent of the preference given to the government by the 5th section of the act of 1797, and it was held by a majority of the court, that it extends to debtors generally, and includes the case of a person becoming indebted to the United States as the indorser of a bill of exchange. This priority does not, however, partake of the character of *lien*, on any specific effects, (*Id. and United States*

v. *Hooc*, 3 *Cranch*, 73, 90, per *Marshall, Ch. J.*,) and therefore the United States cannot follow the property into the hands of a bona fide assignee of a debtor. And in the opinion of Mr. Ch. J. Marshall, an executor or administrator, would not be guilty of a *devastavit* in the administration of the effects of the deceased, unless he had notice of the claim of the government, and paid the assets to other creditors, and thus, *knowingly*, disregarded the preference due to the United States. (2 *Cranch*, 391, note, and per *Platt, J.* in *Aikin v. Dunlap*, 16 *John.* 85.)

The priority thus given to the United States is not waived by their proving their debts before the commissioners of the bankruptcy. (*Harrison v. Sterry*, 5 *Cranch*, 299.) Nor does this priority given to a surety who pays the debt or his principal, extend to an action brought by a surety against his principal, for money paid. It merely transfers to the surety the preference due to the government in the distribution of the effects of the insolvent principal. The latter may, however, when sued by the surety, avail himself of his discharge. (*Aikin v. Dunlap*, *supra*.)

A mere state of insolvency, or inability in a debtor of the United States, to pay all his debts gives no preference to the United States, unless it is accompanied by a voluntary assignment of his property for the benefit of his creditors; or unless his estate or effects shall be attached as those of an absent, concealed, or absconding debtor; or, unless he has committed some legal act of bankruptcy or insolvency. (See note to *U. States v. Howland*, 4 *Wheat.* 118, *et seq.*) The assignment must be of *all* the debtor's property. An omission, however, of a trivial portion, for the purpose of evading the act, would probably be considered as a fraud upon the law. Though a judgment gives to creditor a lien on the debtor's land, and a preference over all subsequent judgments, yet this preference must yield to the priority of the government. (*Thelusson v. Smith*, 2 *Wheat.* 396.)

The priority of the government is general when the debtor is dead. During his life it is limited to the cases above stated. (Note to 4 *Wheat.* 118. *Conard v. The Atlantic In. Co.* 1 *Peters*, 386, 439. *Harris v. De Wolf*, 4 *id.* 147. *Hunter v. The United States*, 5 *id.* 172. *The United States v. The State Bank of North Carolina*, 6 *Peters*, 29.)

The right of priority of payment of debts due to the government, is a prerogative of the crown of England, well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy to secure an adequate revenue to sustain the public burdens, and discharge the public debts. The claim of the United States, however, to priority, does not stand upon any sovereign prerogative, but is exclusively founded on the actual provisions of our own statutes. The same policy which governed in the cases of the royal prerogative may be clearly traced in these statutes; and, as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. (*Id.*)

SECTION III.

Of taxes assessed upon the estate of the deceased previous to his death.

We have seen in the preceding section that the preference given to the United States, in the payment of debts out of the estates of deceased persons, arises out of legislative enactments, founded on principles of public policy, and is not claimed as a prerogative of sovereignty. In England, it is said that the king, by his prerogative, is to be preferred before other creditors, inasmuch as the law regards the royal revenue as of more importance than any private interest. (*Toller*, 259.) This preference, however, belongs to the king, in his *political* capacity, as the representative of the whole empire. For a debt due to him as an individual, he stands on a footing with the meanest of his subjects.

The preference given to the king of England in the payment of debts of record, or by specialty, results from the operation of the statute, 33 II. 8, ch. 39, by which it is enacted that all obligations and specialties, taken to the use of the king, shall be of the same nature as a statute staple. This statute has never been enacted in this state, and it would, therefore, seem that a debt by judgment or specialty to the people, had no preference over one of the same character due to an individual.

The general opinion has always been, that the people of this state succeeded, at the revolution, to all the prerogatives of

the crown, existing at common law, which were applicable to our circumstances and condition. It is upon this principle, probably, that Mr. Bridgen and Chancellor Kent both state that debts due to the people are to be paid before debts of the same rank due to individuals. (*Bridgen's Surrogate*, 63. 2 *Kent*, 416.) Whatever may have been the law before, it has been so changed by the revised statutes, in 1830, as to give a preference only to taxes assessed upon the estate of the deceased previous to his death.

It will not be without instruction to trace the various changes in our legislation on this subject. By the act of 1788, (2 *Greenl.* 176, § 3,) the person in possession of real estate, at the time any tax was to be collected, was made liable to pay it; and authority was given to the collector to sell the timber and grass growing on the land to pay the tax. The 18th section of the act for the assessment and collection of taxes, passed April 8, 1801, (1 *K. & R.* 555,) made a tax a lien on the estate, to be considered as a mortgage. The revised act of 1813, (*L. of 1813*, p. 513, § 10,) declared that all taxes upon any real estate should be a lien thereon, and be preferred in payment to all other charges; and all taxes upon any personal estate, in case of the death or bankruptcy of the person taxed, were also ordered to be preferred in payment to all other demands. From this provision, the preference contained in the revised statutes of 1830 was taken. It is made general. Taxes assessed upon the estate of the deceased, previous to his death, is the language of the section, and it applies to all taxes going to the people, whether assessed on real or personal estate.

But this statute priority is not extended to assessments made by a municipal corporation, though such assessment may be a lien on the real estate of the party. These municipal assessments are payable out of the personal estate, though not entitled to a preference over other debts. (*Seabury v. Bowen*, 3 *Bradf.* 207.)

SECTION IV.

Of the preference in the payment of judgments docketed, and decrees enrolled against the deceased, according to their priority.

The rule of priority, at common law, embraced the judgments of all the courts of record of the kingdom; that is to say, not only the judgments of the courts of Westminster Hall; but also of the courts of cities, or towns corporate, having power by charter to hold plea of debt above forty shillings, as in London, Oxford, and other places. So, it seems judgment in a court of pie poudre, which is a court incident to every fair and market, and is the lowest court of justice known to the law of England, claims the same preference. (2 Wms. Ex'rs, 856, 7. Wentworth's Ex'rs. 271.)

With us the criterion as to priority is not so much the character of the court as the nature of the judgment. It must be a judgment *docketed* or a decree *enrolled* against the deceased. The enrollment of decrees had reference to the practice of the court of chancery, which has since been abolished, and a similar one substituted by the code. (§ 281.) The mode of expression adopted in the statute clearly shows that it has reference only to a *final* judgment of some court in this state, which is *docketed* according to our own laws. (*Brown v. The Public Administrator*, 2 Bradf. Rep. 103.) A judgment recovered in another state has no greater force in respect to the distribution of the assets of a deceased person, than a foreign judgment. Neither at common law, nor under the statutes of this state, have judgments recovered in another state any title to priority of payment over simple contracts. Creditors claiming under such judgments, must, it is said, come in with the creditors of the deceased, described in the 4th class mentioned in the section, and which will be the subject of the next section. (*Id.*)

A judgment of a foreign country is considered merely as a simple contract. (*Hubbell v. Coudy*, 5 John. 132. *Walker v. Witter*, 1 Douglass, 1. *Taylor v. Bryden*, 8 John. 173. *Pawling v. Bird*, 13 *id.* 192.) The courts in this state formerly applied this rule to

judgments of the several states of this union. But since the case of *Mills v. Duryee* (7 *Cranch*, 481,) for the purpose of pleading and evidence, the judgment of a neighboring state, rendered by a court of record therein, is of the same conclusive character as a judgment of the like courts of our own state. This results from the constitution of the United States requiring that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the act of congress of 26th May, 1790, ch. 11, passed in pursuance of the requirement of the constitution, which provides for the mode of authenticating the records and judicial proceedings of the state courts. It enacts "That the records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." This provision evidently has reference only to the faith and credit which are to be given to the judgment as matter of evidence, and the manner in which it is to be treated in pleading. It does not affect the rule of priority in payment.

Judgments of the United States courts in this state are entitled to be docketed, and, like judgments of our own courts, are a lien upon land. It is believed that such judgments are entitled to priority according to the date of their docketing. (*Bernes v. Weisser*, 2 *Bradf.* 212, 214. *Manhattan Co. v. Evertson*, 6 *Paige*, 457.)

Debts entitled to preference under the third class, are not to be paid, like those under the fourth class, *pro rata*, in case of a deficiency of assets, but are entitled to be satisfied in the order of priority. Hence if there be several judgments, docketed on different days, and the assets are only sufficient to pay part, they must be applied in full satisfaction of the elder in point of time, and if any thing remains, it is to be applied to the next in point of time, and so on till the whole fund is exhausted. Nor does it alter the case, that one or more of the judgments have been docketed more than ten years, so that its lien upon the real estate must yield to subsequent liens. The statute does not make that qualification in establishing the priority in the administration of the payments.

It looks to the date of the docket, and not to its effect as a lien. (*Ainslie v. Radcliff*, 7 *Paige*, 439.)

Whether a judgment docketed after the death of the defendant, is entitled to a preference, has sometimes been made a question. In England it has been held that a judgment which is entered up (by virtue of the statute 17 Car. 2, ch. 8, § 1) against the testator or intestate after his death, when that happens between verdict and judgment, shall be considered as if entered up in his lifetime, and entitled to priority of payment by his executors or administrators accordingly. (2 *Ld. Raymond*, 1280.) But when his death happens between interlocutory and final judgment, and the latter is entered up by virtue of the statute 8 & 9 W. 3, it is otherwise, for such judgment is not to be entered against the testator or intestate, but against his executors or administrators. (1 *Salk.* 42. 2 *Saund.* 72.) And it is the same when the death happens after the writ of inquiry is executed and before final judgment. (2 *Will. Ex.* 857.)

The statute of 17 Car. 2, above cited, was re-enacted in this state many years ago. (*See act of 1801*, 1 *R. L. of 1813*, p. 144, § 5.) It was continued in the revision of 1830, as was also the substance of the 8 & 9 W. 3. (2 *R. S.* 387, §§ 3, 4.) There are, however, some qualifications annexed to our present act. Thus, in all cases in which a record of judgment shall be filed and docketed, within one year after the death of the party against whom such judgment was obtained, a suggestion of such death, if it happened before judgment rendered, is required to be entered on the record, and if after judgment rendered, the fact must be certified on the back of the record by the attorney filing the same. Such judgment, it is enacted, shall not bind the real estate which such party shall have had, at the time of his death, but shall be considered as a debt to be paid in the usual course of administration. (2 *R. S.* 359, § 7. *Nichols v. Chapman*, 9 *Wend.* 455, *et seq.*)

It is obvious, 1st. that such judgment cannot bind the real estate of the deceased, because no judgment binds the real estate until it is docketed; and 2d. before the judgment is docketed, the real estate at the death of the party vests in his heirs or devisees.

The object of a docket is not exclusively to bind land and to

notify purchasers. The statute 4 and 5 W. and M. ch. 20, (re-enacted, 1 R. L. of 1813, 501, § 3) provided that no judgment not docketed, should have any preference against heirs, executors or administrators, in their administration of their ancestors, testators, or intestates' effects. In *Hackley v. Hayton*, (6 D. & E. 384,) the construction of this statute was for the first time given; and it was held that the object of the docket was to notify the executor or administrator of the claim; that if the docket was omitted, the judgment must be put on a level with a simple contract. The N. Y. revised statutes declare that no judgment shall be deemed valid so as to authorize any proceeding thereon until the record thereof shall have been signed and filed; nor shall it affect lands, tenements, real estate or chattels real, or have any preference as against judgment creditors, purchasers or mortgagees, until the record thereof is filed and docketed as the law requires. (2 R. S. 360, §§ 11, 12. *Van Ornam v. Philips*, 9 Barbour, 504-5.)

In the case of *Nichols v. Chapman*, *supra*, a judgment had been entered up on a bond and warrant of attorney after the death of the defendant, who died in vacation, as of the preceding term, when he was in full life, and an execution, tested in his lifetime, had been issued to the sheriff and levied, after the defendant's death, on his personal property. The administrators moved the court to set aside this execution for irregularity. The Chief Justice (Savage) in delivering the judgment of the court, observed, that if a person who has executed a bond and warrant of attorney to confess judgment, dies during a vacation, judgment may be entered against him, during the same vacation, as of the preceding term, and it will be valid by the common law. Upon the same principle the execution, at *common law*, might have issued, if tested before the death of the defendant and levied before the next term. But he considered, that under the revised statutes, although judgment might be regularly entered up and docketed, in the manner above stated, yet no execution could regularly issue; that the judgment became a debt to be paid in the regular course of administration. That the usual course of administration in the payment of judgments is to pay the oldest first, the docket being the evidence of the age. In that case, therefore, the execution was set aside as irregular. The court held that the administrators

of the deceased and not the sheriff, were the proper persons to administer the assets.

At common law, between one judgment and another obtained against the deceased, as they stood amongst themselves, precedence or priority of time was not material. (*Toller*, 265. *Ainslie v. Radcliff*, 7 *Paige*, 439. *Trust v. Harned*, 4 *Brad.* 213.) The executor or administrator might pay which he pleased first. But by the New York revised statutes, judgments docketed and decrees enrolled must be paid according to their priority. (2 *R. S.* 87, § 27.) This is merely applying to the administration of personal property, the same rule which before existed as to real property, in the satisfaction of judgments and enrolled decrees; that is to say, of paying them not *pro rata*, nor *ad libitum*, but according to their rank, the oldest first, and thus in succession according to the date of the docket, till they are all paid. It is in the power of the executor or administrator to ascertain from the proper officers, the number and amount of judgments or decrees against the deceased. He ought to obtain this information, and satisfy the docketed judgments and enrolled decrees according to their legal priorities.

The revised statutes, as originally adopted, in their provisions as to docketing judgments and enrolling decrees, had reference to judgments of courts of general jurisdiction, viz: The court of chancery, supreme court, courts of common pleas of the different counties, and superior court of New York. They were framed with reference to the courts established under the constitution of 1822. Since the adoption of the constitution of 1846, the courts have been remodeled, and others created. But the principle relative to the priority, arising from the time of docketing judgments, has been retained; and has been extended to the judgments of justices of the peace, (*Code*, § 63,) decrees of surrogates' courts for the payment of moneys, by an executor or administrator, or guardian. (*L. of 1837*, p. 535, § 63.) And probably to other local courts. Those judgments and decrees, when docketed, are to be paid according to their priority.

A judgment obtained against an executor or administrator is entitled to no such preference. Nor does the commencement of a suit against the personal representatives, for the recovery of any

debt, confer any advantage as it formerly did. (2 *R. S.* 87, § 28. *Parker v. Gainer*, 17 *Wend.* 560. *Butler v. Hempstead's Adm'rs*, 18 *id.* 666.)

SECTION V.

Of the payment of recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts.

The fourth and last class of debts to be paid by the executor or administrator is that named at the head of this section. This embraces every other species of debts not included in the preceding sections; and every other demand which it is the duty of an executor or administrator to discharge. There is one strong feature which marks this class of demands. They are all placed upon an equality as to payment. It is expressly enacted that no preference shall be given in the payment of any debts of the same class, except in the case of judgments docketed and enrolled decrees.

Nor does the fact of the debts not being due, make any difference. Debts not due may be paid by an executor or administrator, according to the class to which it may belong, after deducting a rebate of legal interest upon the sum paid for the time unexpired. (2 *R. S.* 87, § 29.)

The only exception to the rule of equality in this class, is in the case of rents due or accruing upon leases held by the testator or intestate, at the time of his death. In regard to them, the statute enacts that preference may be given by the surrogate to such rents whenever it shall be made to appear, to his satisfaction, that such preference will benefit the estate of the testator. (*Id.* § 37.) This exception was not proposed by the revisers, but was inserted by the legislature, probably for the reason that by the law, then in force between landlord and tenant, the goods might be liable to be seized and sold under a distress warrant, issued by the landlord. (2 *R. S.* 500.) Distress for rent was abolished in 1846, (*L. of 1846, ch. 274.* 3 *R. S.* 829, 5th ed.) and thereby the principal reason for this preference was taken away. Still the exception remains, and there may be cases when it should be allowed. With this exception, all the provisions of the revised statutes imply that the debts embraced in this section shall be paid *ratably*.

Thus, it is provided, that in any suit against an executor or administrator, the defendant may show, under a notice for that purpose, given with his plea, that there are debts of a prior class unsatisfied, or that there are unpaid debts of the same class with that on which the suit is brought, and judgment shall be rendered only for such part of the assets in his hands as shall remain after satisfying the debts of the prior class, and as shall be a just proportion to the other debts of the same class with that on which the suit is brought. But the plaintiff may, as in other cases, take judgment for the whole or part of his debts to be levied of future assets. (2 R. S. 88, § 31.) The change of pleading introduced by the code has made some modification in the practice in this respect. The supreme court, in *Allen v. Bishop*, (25 Wend. 415,) took notice of the impossibility of reconciling some sections of the revised statutes with the general system prescribed in respect to the settlement of the estates of deceased persons. The chief justice (Nelson) observed that a *pro rata distribution* among the creditors of a class, in case of a deficit in the assets, is a fundamental principle, for the enforcement of which abundant provision is made. The whole fund is brought under the control of the surrogate, and not a dollar can be touched without his assent. Executors and administrators are but trustees to settle the estate under his direction and control, agreeably to the principles of the statute. Nothing is gained by obtaining a judgment against them beyond the liquidation of the debt. The creditor gets no costs, except at the discretion of the court, and only his *pro rata share* on the judgment. The result is the same whether the suit is defended or not. (18 Wend. 666. 12 id. 542. 17 id. 559.) And hence the court held that a plea of *plene administravit*, and *plene administravit preter*, were no longer appropriate, and the latter not a bar, although the 31st section of the act imported the contrary.

In case a judgment is obtained against an executor or administrator, no execution can be issued until an account of his administration shall have been rendered and settled, or on an order of the surrogate who appointed him. And if an account has been rendered by such executor or administrator, execution shall only issue for the sum that shall appear on the settlement of such account to have been a just proportion of the assets applicable to the judg-

ment. (*Id.* § 32. *Winne v. Van Schaick*, 9 *Wend.* 448. *The People v. Judges of the Albany Mayor's Court*, *id.* 489.)

Nor is there any preference given to a debt due to an executor or administrator from the deceased. Such debt is placed upon the same footing of equality as other debts, and must be first allowed by the surrogate before payment. (*Id.* 33. *Treat v. Fortune*, 2 *Bradf.* 116. *Rogers v. Hosack's Ex'rs*, 18 *Wend.* 319. 6 *Paige*, 426, *S. C.*) This allowance may be made on the return of a citation for that purpose, directed to the proper persons, or on the final accounting of the executor or administrator, which will be hereafter considered. (*L. of 1837, ch. 460, § 37.* 3 *R. S.* 175, 5th ed.)

At common law the rule of payment was otherwise. Recognizances ranked next after judgments, and then specialties, and lastly simple contract debts. But the executor or administrator might pay which of the same class he pleased, without reference to priority; or he might distribute equally among those of the same class. Hence if there were several creditors by specialty, he might pay one alone his whole debt, and leave the others unpaid, in case of a deficiency of assets. (*Toller*, 271 to 288.) In like manner among simple contracts, the executor or administrator might pay one, and that the youngest creditor, to the exclusion of the others. It was sufficient evidence to support a plea of *plene administravit*, that the assets were paid to a creditor, and it was no evidence of a *devastavit*, that other creditors of the same class were thus left unpaid. The commencement of a suit, at law or in equity, gave a priority over other creditors in equal degree, but the executor or administrator might go and confess a judgment to another creditor, in equal degree, and thereby defeat the creditor who first sued, by pleading the judgment and *nil ultra*, &c. (2 *Kent's Com.* 416, 417.) The injustice of the common law rule of payment was early felt, and in chancery the distribution of what are termed equitable assets was more liberal and equitable. No distinction was made in that court, as to the quality of the debts, except debts which had acquired a priority by a legal lien, and the creditors were paid *ratably*, if the assets were not sufficient to pay all of them. The legislature seems to have had this in view when the revised statutes were enacted.

A recognizance is an obligation of record; it may be entered into before a court of record, or a magistrate duly authorized, conditioned for the performance of a particular act; as to appear at court, to keep the peace, to pay a debt, or the like. The party who enters into the recognizance is called the cognizor "*is qui cognoscit*;" and he to whom the debt or obligation is acknowledged, the cognizce, "*is cui cognoscitur*." The instrument being either certified to, or taken by the officer of some court, is authenticated only by the record of such court, and not by the party's seal. (2 *Blk. Com.* 341.) In this state, such recognizances as are required or authorized to be taken in any criminal proceeding, in open court, by any court of record, are entered in the minutes of the court, and the substance is read to the person recognized; all other recognizances in any criminal matter or proceeding under the laws respecting the internal police of the state, are required to be in writing and subscribed by the parties to be bound thereby. (2 *R. S.* 746, § 24. *The People v. Rundle*, 6 *Hill*, 506. *Same v. Graham*, 1 *Parker's Cr. Rep.* 141.)

If the testator or intestate is bound in a joint and *several* obligation, his executor or administrator may pay it out of the estate of the deceased; but if the testator or intestate is bound in a *joint* obligation merely, the survivor must be charged out of his own estate, and the executors or administrators of the deceased co-obligor are not liable at law, on the instrument, nor can they set up any payment of it. (*Bac. Abr. title Obligation, D. 4. Towers v. Moore*, 2 *Vern.* 99.) This is an incident of the other rule that the right to a joint debt on obligation, *at law*, goes to the survivor. In equity it is otherwise; for though the obligation be joint and one of the obligors dies, yet if the obligee cannot recover the amount due against the survivor, the estate of the deceased is liable.

A debt secured by mortgage was formerly a charge upon the personal assets, whether there was a bond accompanying the mortgage or not; nor did it make a difference whether there was an express covenant contained in the mortgage to pay the money, or not. (1 *P. Wms.* 291, 294. 2 *id.* 455. 3 *id.* 358. *Mollan v. Griffith*, 3 *Paige*, 404.) If, however, there was no bond or cov-

enant, the debt was ranked as a simple contract and was postponed in favor of specialties. If there was an express covenant to pay, or a bond accompanying the mortgage, it took rank as a specialty debt and the executor or administrator was bound to discharge it, and thus leave the inheritance incumbered to the heir or devisee. (*Id.*) But this doctrine is now modified by the revised statutes. Thus, it is enacted, (1 R. S. 738, § 139,) that a mortgage shall not be construed as *implying* a covenant for the payment of the sum intended to be secured. And as a consequence from this position, it is also provided that, where there is no express covenant for the payment of the money, contained in the mortgage, and no bond or other separate instrument to secure such payment, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. (*Hone v. Fisher*, 2 Barb. Ch. R. 559.) The operation of this provision is to release the personal estate from the payment of a mortgage, when the deceased had entered into no obligation to pay the money secured by it. Accordingly, it is further enacted, that whenever any real estate, subject to a mortgage executed by any ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage out of his own property without resorting to the executor or administrator of his ancestor, unless there be an *express* direction in the will of such testator, that such mortgage be otherwise paid. (1 R. S. 749, § 4. *Taylor v. Wendel*, 4 Bradf. 324.) Hence when a surrogate decrees a distribution of the personal estate of the deceased debtor among his creditors, if any such creditor have a security for his debt upon another fund which is primarily liable for the payment of the debt, the surrogate should compel such creditor to exhaust his remedy against such fund, and only to come in as against the personal estate for the deficiency. And when distribution of such personal estate must be made before such deficiency can be ascertained, he should direct a portion of the personal estate to be retained to meet the contingent claim for such deficiency. (*Halsey v. Reid*, 9 Paige, 446. *Smith v. Lawrence*, 11 *id.* 207.)

The general clause in a will directing the payment of all the testator's debts by his executors is not sufficient to charge the executors with the payment of a mortgage on real estate devised.

To interfere with the provisions of the statute relieving the general estate from the charge, there must be some *express* direction in the will to that effect. The usual formula in a will, directing all his debts to be paid, is not sufficient for this purpose. (*Taylor v. Wendel*, 4 *Bradf.* 324.) Hence, where the testator by his will bequeathed the sum of \$20,000 in trust for his niece, and afterwards, by a codicil, devised to her a house and lot in lieu of a portion of the legacy; the premises devised being subject to a bond and mortgage at the time of his death, and the will containing only the usual direction to pay debts, it was held by the learned surrogate of New York that the devisee took the land *cum onere*, and was bound to pay the mortgage and the interest thereon. (*Id.*) As between the devisee and executor in such a case, the mortgage is the principal security, and the land the primary fund for its discharge.

The alterations made by the revised statutes in the duties of executors and administrators in the payment of debts of the deceased, the abolition of preferences among creditors, except where a legal lien has been acquired by a judgment docketed or decree enrolled, and the taking away of the advantage which was formerly given to commencing suits against executors and administrators and obtaining judgments, have much simplified their labors, diminished their responsibility, and rendered an examination of the old cases on this subject, in a great measure, unnecessary. It is the policy of the law to make it for the interest of the creditors of the estate to exhibit their claims at an early period, and to receive their debt, or such portion of it as the estate is able to pay, without resorting to a suit. The executor or administrator should ascertain as soon as possible the extent of the assets; he should adopt the appropriate means to learn the amount of the just demands against the estate, and should pay them in the manner the law requires. He should not be too precipitate in making payments on the one hand, lest the assets would not be sufficient to satisfy all; nor should he be too dilatory on the other, lest he should be subjected to costs.

SECTION VI.

Of the payment of an inferior debt before a superior, and of miscellaneous matters in relation to this subject.

An executor or administrator is bound to take notice, at his peril, of all judgments docketed and decrees enrolled; and it is for this purpose, in part, that a docket is required to be made. If, therefore, he pays debts of a lower rank first and thus exhausts the assets, he shall be held liable to pay out of his own estate such judgments or decrees, or preferred demands, as shall be thus defrauded. (*Toller*, 278, 292.) If, for example, he should pay a creditor at large, and leave unsatisfied a preferred debt due to the United States, he would be held liable to the extent of the assets which he had thus improperly distributed.

In analogy to this principle, it would seem that if an executor or administrator pays the *whole* of a debt due to one creditor when the assets admit only a proportionate part of it to be satisfied, and thus diminishes the ratable proportion of the other creditors, he would be answerable out of his own estate to make good the loss occasioned by such erroneous payment. At common law it was required to create this liability, that the executor or administrator *had notice of the existence* of the other debts, or made the payment so precipitately after the testator's death as to be evidence of fraud. (*Toller*, 192.) The means of obtaining that knowledge now, are most ample. An executor or administrator can, in no instance, be *compelled* even by the surrogate to pay any debt of the testator or intestate until after six months shall have elapsed, from the granting of letters testamentary or of administration. (2 *R. S.* 116, § 18.) The statute seems to contemplate that he cannot know with certainty the extent of the demands against the estate so as to be able to pay without the order of the surrogate, until after the expiration of the six months' notice inserted in the newspapers, under the direction of the surrogate, and which notice cannot be given until at least six months have elapsed from the letters testamentary or of administration. (*Nichols v. Chapman*,

9 *Wend.* 456, 457. 2 *R. S.* 88, 89. *Fitzpatrick v. Brady*, 6 *Hill*, 582.)

Hence, in the settlement of estates, when the testator or intestate has been engaged in extensive business in his lifetime, and was much indebted, and his solvency questionable, it would be dangerous for an executor or administrator, without the order of the surrogate, to make any payment in whole or in part of a debt of the deceased, until after the expiration of six months from the date of his letters; and it is not deemed prudent to distribute the assets until after the expiration of the year from the date of the letters and the demands have been presented and allowed, in pursuance of the six months' notice before mentioned. The statute, in truth, virtually allows the executors and administrators eighteen months after the granting to them of letters to settle the estate, for the purpose of securing more effectually the leading feature of the system, to wit, a *pro rata* distribution of the assets among the creditors in case of a deficiency. (*Fitzpatrick v. Brady*, 6 *Hill*, 582.)

There is much learning in the old books relative to pleading by executors or administrators. They were bound to plead a debt of a higher nature in bar of an action brought against them for a debt of an inferior nature, and *riens ultra*, if he had not assets for both, otherwise it would be an admission of assets to satisfy both debts; unless it appeared that he had no notice of the higher debt. But all this doctrine is superseded by the revised statutes. (*Butler v. Hempstead's Adm'rs*, 18 *Wend.* 666.)

Where there is no will, or the will does not otherwise direct, the personal estate, except in the cases which have been mentioned, is the primary fund for the payment of debts and legacies. (*Lupton v. Lupton*, 2 *John. Ch.* 614.) The usual clause devising all the rest and residue of his real and personal estate not before devised, is not sufficient to show an intention to charge the realty; nor is a mere direction that all debts and legacies are to be fully paid. (*Id.*)

Independently of any express statute regulation, it would be the duty of the executor or administrator to convert the assets into money, in order to pay the debts and legacies of the deceased. The statute which declares this duty, permits this sale to be pub-

lie or private, and, except in the city of New York, to be on credit, not exceeding one year, with approved security. The executor or administrator is not responsible for any loss happening by such sale, when made in good faith, and with ordinary prudence. (2 R. S. 87, § 25.)

It would be unwise, if not improper, to give a credit which might extend beyond the eighteen months allowed to the executors or administrators to close their accounts. Great caution should be practiced in taking security; especially as both the giving of credit and taking personal security, in cases of sales of property held in trust, are innovations upon the practice of courts of equity.

In making such sales, such articles as are not necessary for the support and subsistence of the family of the deceased, or as are not specifically bequeathed, should be first sold; and articles so bequeathed, should not be sold until the residue of the personal estate has been applied to the payment of debts. (*Id.* 26.) This subject has already been adverted to in our chapter on taking an inventory, and it has been shown that doubtful claims may be compromised by the executor or administrator with the approbation of the surrogate. (*See ante*, ch. 9, § 4.)

At common law the surrogate has no jurisdiction over the real estate, nor could the real estate be sold by the executors or administrators for the payment of debts. At present, when the personal representatives discover that the personal estate is insufficient for this purpose, they may, at any time, within three years, after the granting of their letters testamentary or letters of administration, apply to the surrogate for authority to mortgage, lease or sell so much of the real estate of their testator or intestate, as shall be necessary to pay such debts. This application cannot be made until after the filing an inventory according to law. (2 R. S. 100.) The object of this sale is to raise a fund for the payment of debts. As this did not belong to the common law jurisdiction of the surrogate, and has been conferred by statute, and as other tribunals have a jurisdiction in the collection of debts against deceased persons to reach the real estate left by them, the consideration of the practice of the surrogates' courts in this respect, falls more appropriately under the third part of this treatise. (See post, Part 3, ch. 1.)

After the payment of debts, the next duty of an executor is to pay the legacies bequeathed by the testator. This is a duty which belongs more especially to an executor, but the rules by which it is regulated are equally applicable to an administrator *cum testamento annexo*. The court of chancery formerly, and now the supreme court, has a jurisdiction over executors with respect to legacies, more ample than that possessed by the surrogate. The jurisdiction of the latter court is subordinate to that of the supreme court, and, in some respects, concurrent with it. The further consideration of this branch of the subject belongs to the third part of this treatise, which is devoted to subjects over which surrogates have not an exclusive jurisdiction, and to some peculiar statutory proceedings.

CHAPTER XII.

OF THE RIGHTS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, WITH RESPECT TO THE PAYMENT OF THE DEBTS OF THE DECEASED.

SECTION I.

Of the rights and duties of executors and administrators with respect to calling for a presentation of claims against the estate, and herein of enforcing payment before the time to account.

The creditors of a deceased person have a stronger claim on the property which he leaves at his death, than his legatees. Hence, except in some special cases provided for by law, the debts must be paid before legacies.

There may be cases where the assets are undoubtedly sufficient to pay all the debts and legacies. In such a case, where all the parties entitled as legatees and distributees are of full age, and are willing amicably to settle the estate, no reason is perceived why they may not do so without waiting for the expiration of the eighteen months, which at present executors and administrators

practically have for this purpose. But in doing so, they act at their peril.

The statute, however, is made to embrace every class of cases, in a great majority of which it is impossible to know at once, either the condition and amount of the assets, or the nature and extent of the claims against them. As the policy of the law is to cause an equal *pro rata* distribution of the assets among all the creditors, after satisfying certain preferences considered in the last chapter, it was obviously necessary that some means should be adopted by which the executors or administrators might ascertain the amount of the claims against the estate before they could be compelled to make payment, or a general distribution.

For this purpose, six months are allowed from the date of the letters testamentary or of administration to collect the assets, and to ascertain the extent of the claims against the estate. If within this time the executor or administrator does not ascertain all the demands against the deceased, and if he wishes, in due time, to render an account and be discharged from further responsibility, he may, at any time after the expiration of six months from the date of his letters, insert a notice, once a week in each week for six months, in some newspaper printed in the county, and in so many other newspapers as the surrogate may deem most likely to give notice to the creditors of the deceased, requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to the executor or administrator, at his place of transacting business, to be specified in the notice, at or before the day therein named, which shall be at least six months from the first publication of the notice. (2 R. S. 88, § 34.) The usual practice is for the surrogate, on the application of the executor or administrator, in an informal way, after the expiration of six months from the date of the letters, to enter an order in his minute book, requiring the publication of notice as prescribed by law, and designating the paper or papers in which it is to be published. It is a compliance with the law if published in a single paper, if that be so ordered by the surrogate. (*Dolbeer v. Casey*, 19 Barb. 149. Appendix, No. 69.)

Although not required by the statute, it is the most correct practice to file with the surrogate the affidavit of due publication of the

notices, in pursuance of the former order, and to enter in the minute book another order, directing the executor or administrator to proceed and pay the different claimants the sums to which each is respectively entitled.

Upon any claim being presented against the estate of the deceased, the executor or administrator is authorized to require satisfactory vouchers in support thereof; and also the affidavit of the claimant that such claim is justly due, that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant. This oath may be administered by any justice of the peace or other officer authorized to administer oaths. (2 R. S. 88, § 35.)

It is recommended to executors or administrators always to pursue this course, and more especially, where their testator or intestate has been, in his lifetime, engaged in extensive business. (*Whitmore v. Foose*, 1 Denio, 159.)

It would seem, by necessary implication, that if the executor or administrator is satisfied of the validity of the claim and of the amount due, from the vouchers and affidavit presented, he may allow it and pay it, in the due course of administration, without further proof. The statute seems not to have clothed the surrogate with jurisdiction to try a contested claim. (*Dissosway v. The Bank of Washington*, 24 Barb. 60. *Wilcox v. Smith*, 26 id. 316.) Hence, if the executor or administrator, notwithstanding the oath and vouchers, doubt the claim, there should be some way pointed out for removing those doubts, or enabling the creditor to assert his claim. This is done by the statute, which authorizes the executors or administrators in such a case, with the approbation of the surrogate, to enter into an agreement in writing with the claimant to refer the matter in controversy to three disinterested persons, or to a disinterested person, to be approved by the surrogate. On filing this agreement in the clerk's office of the supreme court of the county in which the parties or either of them reside, a rule may be entered, either in term or vacation, referring the matter in dispute to the person or persons so selected. The referees or referee so appointed proceed to hear and determine the matter, and make their or his report therein to the court in which the rule for their appointment is entered. (2 R. S. 88, 89, § 36,

37, *as amended in 1859, Laws, p. 569.*) The subsequent practice will be found in treatises on the practice of the supreme court, and does not fall within the scope of this work. (Appendix, No. 70.)

If a claim is thus presented and disputed, and if the parties do not agree to refer it, and if the claimant does not within six months after it is rejected, if the claim is then due, otherwise, within six months after the same or some part of it becomes due, commence an action against the executors or administrators for the recovery thereof, he is to be forever barred from maintaining any action thereon. And no action after that period can be maintained thereon by any person deriving title thereto from such claimant. (2 *R. S.* 89, § 38.)

There are two cases which arise in this stage of the matter which have often received the consideration of the courts; the one is with regard to the short statute of limitations, and the other with regard to the question of the plaintiff's right to costs, and out of what fund they are to be paid. Both these questions belong, in the first instance, to the court in which the action is tried, namely, the supreme court, and neither of them can ever be litigated before the surrogate. The discussion of them does not fall within the scope of this treatise; and, therefore, a few remarks only will be added: 1. If, on a demand being presented to an executor or administrator pursuant to the statute, he asks time to inquire into and examine it, he will not be allowed to avail himself of the short limitation without giving decisive evidence of having rejected it more than six months before the suit was brought. (*Reynolds v. Collins*, 5 *Hill*, 36.) It is perfectly proper for the executor or administrator to take time to investigate before deciding; but the statute giving the short limitation will not begin to run till he has unequivocally rejected the claim. 2. With regard to costs, it is now well settled that to entitle the plaintiff to costs of the action against the executors or administrators, one of two things must occur, to wit, either, 1. a refusal on their part to refer the claim after they have disputed it, or 2. an unreasonable resistance or neglect of payment, after it has been presented. A mere rejection of the claim is not a substitute for a refusal to refer. (*Bullock v. Bogardus*, 1 *Denio*, 276. *Fort v. Gooding*, 9 *Barb.* 390.) The *dictum* at page 394, "that an unqualified

rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer," is contrary to the introductory part of the opinion, has frequently been overruled, and cannot be supported. (*See* 12 *How.* 282. 15 *id.* 304. 16 *id.* 407.)

If the executors or administrators omit to give the notice, as required by the statute, no laches is imputable to the creditor if he fails to present his claim till after the year has expired from the granting of letters. (*Fort v. Gooding, supra.*) No other limitation can then be insisted on, but the ordinary statute of limitations. (*Flagg v. Ruden, 1 Bradf.* 193.) The creditor is not bound to exhibit the evidence of his claim, or make oath of the justice of it, unless required to do so by the executors or administrators. (*Gansevort v. Nelson, 6 Hill,* 389.) Nor does the omission of the latter to publish the notice to exhibit claims, subject them, as a matter of course, to costs, in case the creditor prosecutes them in the supreme court, and recovers judgment. (*Bullock v. Bogardus, supra. Russell v. Lane, 1 Barb. S. C. R.* 527. *Fort v. Gooding, supra, overruling in this respect Harvey v. Skillman, 22 Wend.* 571.) Nor must the creditor wait until the publication of notice, before exhibiting his claim. He may present it any time after the appointment of the executors or administrators, either with or without vouchers at his election. If the executors or administrators desire to see the evidence of the claim, or require an affidavit of the claimant, they must say so. (*Gansevort v. Nelson, supra. Russell v. Lane, supra.*) If, however, he presents it before the publication of notice, and the notice to exhibit claims be afterwards published, he should present it again within the time limited for that purpose. (*Whitmore v. Foose, supra.*)

On the expiration of the six months notice, the executors or administrators have a right to assume that the debts and claims exhibited to them are all that exist against the deceased; and they are authorized to make payment upon that hypothesis. And in case a suit should be brought against them on a claim not presented, in pursuance of the said notice, they are not chargeable for any assets or moneys that they may have paid in satisfaction of any claims of an inferior degree, or of any legacies, or in making distribution to the next of kin, before such suit was commenced,

but may prove such notice published as aforesaid, and payment and distribution, in support of their plea of having fully administered the estate of the deceased. The plaintiff in such action is only entitled to recover to the extent of the assets unadministered at the commencement of the suit, or he may take judgment of assets *in futuro*. (2 R. S. 89, §§ 39, 40. *Baggott v. Boulger*, 2 N. Y. Sup. C. R. 160. *Parker's Ex'rs v. Gainer's Ex'rs*, 17 Wend. 560. *Allen and wife v. Bishop's Ex'rs*, 25 Wend. 414.) The whole administration seems to be committed to the surrogate, and the common law courts are reduced to little more than instruments of liquidation. (*Per Cowen, J.* 17 Wend. 650.)

The omission to exhibit a claim to the executor or administrator within the time prescribed in the notice, does not bar the claimant from recovering the same of the *next of kin or the legatees* to whom the assets have been paid over by the executor or administrator. (2 R. S. 90, § 42.) The policy of the law is not so much to defeat a just claim, as to protect persons acting in a representative capacity from being harassed with suits, and to fix a reasonable limit to their liability. The remedy, in such cases, against the distributees to whom the assets have been paid, cannot be obtained in the surrogate's court, but must be prosecuted in a court having jurisdiction, the supreme court, superior court, &c., as the case may. What is necessary to be averred and proved in such court, will be seen in the adjudged cases where various questions have been discussed. (*Schermerhorn v. Barhydt*, 9 Paige, 28, 46. *Leonard v. Morris*, *Id.* 93. *Wilkes v. Harper*, 1 Com. 586. *Mersereau v. Ryerss*, 3 *id.* 261.)

A debt against the estate cannot with safety be paid by an executor or administrator, within the first six months after the date of the letters testamentary or of administration. If he pays any thing before that time, he does it at his peril. If the assets prove to be insufficient to pay all the debts, and he has, out of a mistaken view of the matter, prematurely paid one, or more, his or their whole claim, he will be responsible to the other claimants for the excess thus paid, beyond the share to which they were entitled. After the first six months, and even before the expiration of the notice given in pursuance of the statute, the executor or administrator *may* be compelled, by order of the surrogate upon

the application of a creditor, to pay any debt or a proportional part thereof. (2 R. S. 116, § 18.) The statute is not mandatory upon the surrogate, but *permissive*. Such order, therefore, should not be made by the surrogate, before the time limited for exhibiting claims has elapsed, except it clearly appears that the debt sought to be paid in advance of the other creditors is undisputed and not barred by the statute of limitations, and from the condition of the assets, that the estate is amply sufficient to pay all demands which probably exist against it. (*Fitzpatrick v. Brady*, 6 Hill, 581. *McCartee v. Camel*, 1 Barb. Ch. R. 456, 465. *Kidd v. Chapman*, 2 id. 424.)

It has already been stated, that the surrogate has no power, on such an application, to try contested suits. (*Dissosway v. The Bank of Washington*, 24 Barb. S. C. R. 60.) If there be a defense to such a claim, it should be stated in due season, that the claimant may rebut it. (*Van Veck v. Burroughs*, 6 Barb. 341.)

SECTION II.

Of enforcing the payment of judgments against executors or administrators.

There are three classes of cases which fall under our consideration in discussing this subject. 1. Where the judgment has been obtained against the testator or intestate in his lifetime, but no execution issued before his death. 2. Where a judgment has been obtained against executors or administrators for a debt of their testator or intestate by default. 3. Where a judgment for a debt of the deceased has been obtained against the executors or administrators after a trial at law on the merits.

In the first class of cases, viz. where the judgment was obtained against the testator or intestate in his lifetime, and no execution issued previous to his death, it is said no *scire facias* is necessary to make the executors or administrators parties to the action, but that an execution may be issued upon the judgment by order of the surrogate, after an account shall have been rendered and settled before him. (2 R. S. 88, § 32. *The People v. The Judges of Albany Co.*, 9 Wend. 488 *et seq.* *Butler v. Hempstead's Ex'rs*, 18 Wend. 667. *Dox v. Backenstose*, 12 id. 542.) The account

here referred to is the final account which executors or administrators can be required to render at the expiration of eighteen months from the date of their letters.

The second class of cases is where a judgment has been obtained against executors or administrators for a debt of their testator or intestate by default. This case falls within the same rule. No execution can be issued upon the judgment against the executors or administrators, until an account shall have been rendered and settled, or unless on an order of the surrogate. And if an account has been rendered to the surrogate by such executor or administrator, execution shall issue only for the sum that shall have appeared, on the settlement of such account, to have been a just proportion of the assets applicable to the judgment. (*See same cases.*) The account referred to here is believed to be the final account of the executors or administrators. It is not believed that it was intended by the legislature that the payment of the judgment in either of the above classes, was to be anticipated by any order of the surrogate. This will appear obvious when we come to consider the next class of cases.

The third class is where a judgment for a debt of the deceased has been obtained against the executors or administrators after a trial at law on the merits. With respect to this class, it is enacted, that where a creditor shall have obtained a judgment against any executor or administrator, *after a trial at law upon the merits*, he may, *at any time* thereafter, apply to the surrogate having jurisdiction for an order against such executor or administrator, to show cause why an execution on such judgment should not be issued. (2 R. S. 116, § 19.) This is the only case in which the surrogate has jurisdiction to order the issuing of an execution against an executor or administrator, before the rendering of the final accounts of the estate. In this case the application may be made *at any time*. But in no case can it be issued without the order of the court, either on special application or by the final decree.

The proceedings are briefly stated in the statute. The surrogate to whom the application is made is required to issue a citation, requiring the executor or administrator complained of, at a certain time and place therein to be named, to appear and account before

him; and if upon such accounting it shall appear that there are assets in the hands of such executor or administrator, properly applicable under the provisions of the statute, to the payment in whole or in part of the judgment so obtained, the surrogate is required to make an order that execution be issued for the amount so applicable. (2 *R. S.* 116, § 20.) This order, by the next section, is made conclusive evidence that there are sufficient assets in the hands of the executor or administrator to satisfy the amount for which the execution is directed to be levied; and by the following section it is provided, that if the whole sum for which a judgment may have been obtained, shall not be collected on the execution so directed to be issued, and assets shall thereafter come into the hands of the executors or administrators, the surrogate is required to make another order for issuing execution upon the application of the creditor, his personal representatives or assignees, and to proceed in the same manner from time to time, whenever assets shall come to the hands of the executors or administrators, until the judgment is satisfied.

There may be an appeal from this order, but it is not to operate as a stay of proceeding, unless security is given conditioned for the payment of the whole sum directed to be levied, with interest, in case the order appealed from is confirmed. (2 *R. S.* 116, § 21.) There is no appeal from the order of the surrogate directing an execution to be issued on any other judgment than after a trial at law upon the merits. (*Davies v. Skidmore*, 5 *Hill*, 503.) It is quite obvious that no appeal would be required except the appeal from the final decree. As no separate order is made by the surrogate, directing execution to issue in advance of the final settlement, there is nothing to appeal from.

The mode of obtaining an order from the surrogate for the payment of a debt, before the time for exhibiting claims has elapsed, or for an order for the issuing execution against an executor or administrator, after a trial at law on the merits, is by petition to the surrogate, briefly stating such facts as would entitle the creditor to the interposition of the court, and asking for the appropriate relief. The petition should be verified. On filing it, an order should be entered in the minutes directing a citation to issue re-

quiring the executor or administrator, at a certain specified time and place, to appear and account before him, and to show cause why execution should not issue on the said judgment.

The statute does not prescribe the time of service ; it is, therefore, within the discretion of the surrogate, and should be governed by the practice in analogous cases.

If the parties appear on the return of the citation, and the executors or administrators wish to contest the right of the plaintiff to an execution to the whole or any part of the amount of the judgment, or to the whole or any part of the debt, if the claim was not reduced to judgment, they should interpose such answer in writing as is adapted to the nature of the defense.

If the defense in either case contests the liability of the executors or administrators, on the ground of the original invalidity of the claim, or sets up payment, the statute of limitations, or other defense requiring a trial, the surrogate should, in my judgment, dismiss the application, and leave the parties to their remedy by action at law, or by reference, as the case may be. The only contest which the surrogate can entertain, in this stage of the proceedings, has reference to the state of the accounts and the condition of the assets. On the final accounting, where all parties interested in the estate have notice, and have a right to be heard, the surrogate must necessarily hear and decide such contests as arise, as well with respect to the original validity of the claims presented, as any legal or equitable defense that may exist to them.

If disputed claims could be presented to the surrogate, in advance of the day for final settlement, and be heard and allowed by the surrogate, it would be in the power of the party holding a dishonest, or a previously satisfied claim against the estate, to select his own time, after the first six months from the date of the letters, and before the expiration of the notice to the creditors. He would thus obtain a hearing *ex parte*, and without any *active* collusion with the executors or administrators, obtain an order from the surrogate for the payment of a demand, which might, perhaps, have been disproved, had it been presented when the other parties interested in the estate had notice. The most questionable claims would be presented in this way. These reasons do not apply to a

case where a judgment has been obtained against the executors or administrators *after a trial at law on the merits*; for in that case all have had an opportunity to resist the recovery, and there is, therefore, nothing left for the surrogate but to inquire into the condition of the assets and the other claims upon them.

There is, however, respectable authority on both sides of this question, and it does not yet seem to have been decided by the court of appeals. (In addition to the cases before cited, *see Campbell v. Bruen*, 1 *Bradf.* 125 *et seq.*, and the *dictum* of Nelson, *Ch. J.*, in *Butler v. Hempstead's Adm'rs*, 18 *Wend.* 669. *Dayton's Surrogate*, 346, and note *g*, where numerous cases are collected.)

When all the claims against the estate are ascertained, the executors or administrators should proceed with due diligence to pay the debts of the deceased, and the legacies. If the assets are ample for this purpose, he should pay all. In such a case, it will not be necessary for him to render an account before the surrogate, if the parties interested are of age and under no disability. If, however, the assets are insufficient to pay all the debts, he must first satisfy the claims entitled to priority, and make a pro rata distribution of the residue among the remaining creditors. If he has a claim against the estate in his own behalf, he must cause it to be allowed by the surrogate, on a citation to the proper parties. (3 *R. S.* 175, 5th ed. *L. of* 1837, *ch.* 460, § 37.) If there is property enough to pay the debts, and only a part of the legacies, he must pay such as are entitled to a preference by the will, or otherwise, and divide the balance among the other legatees, on the principles applicable to such cases. If the testator died intestate, the assets, after paying debts, must be distributed to the kindred according to the statutes of distributions. In many instances this can be satisfactorily done without recourse to legal proceedings.

We shall, in a subsequent chapter in the third part, treat of the payment of legacies, and in another chapter, of the rendering the final account of executors and administrators, and of the rules by which the estates of deceased persons are distributed among the parties entitled thereto. The executors or administrators may always settle the estate upon those principles, without resort to

the courts, if the parties desire it. But as there are cases where the rendering of a final account becomes indispensable, and the subject is discussed in a subsequent chapter, it is deemed best, in order to prevent repetition, to postpone, until then, the further consideration of this branch of the subject. (For forms, see Appendix, Nos. 71, 72, &c. &c.)

PART III.

OF SUBJECTS COGNIZABLE IN SURROGATES' COURTS OF WHICH THEY
HAVE NOT EXCLUSIVE JURISDICTION, AND HEREIN OF VARIOUS
STATUTORY PROCEEDINGS IN THOSE COURTS.



IN the third section of part first of this treatise (ante, page 36,) we stated the general jurisdiction of surrogates' courts as it is defined in the revised statutes. In the second part we have discussed the subjects over which surrogates have *exclusive original* jurisdiction, and the method of proceeding therein. It has been seen that those subjects fall within the first and second branch of the section which declares the general jurisdiction of the court, and that they relate mainly to matters testamentary and of intestacy, and of whatsoever is incident thereto. That branch of our subject is the most important, and calls the most frequently for the exercise of the powers of the court. It has been treated more fully and at large than will be necessary in considering the other subjects over which the court, either in conjunction with, or auxiliary to, other courts, or concurrently with them, exercises jurisdiction.

In the third part we propose to treat of the practice of surrogates' courts, in matters in which they have not exclusive jurisdiction. In some of these cases the court exercises a common law power, modified indeed by the statutes; and in others it merely performs a duty enjoined on it by statute. The object to be attained by some of these proceedings is to enable executors and ad-

ministrators to acquire a fund for the payment of debts by some disposition of the real estate of the deceased; in others to enforce the payment of debts and legacies, and the distribution of the estates of intestates; to appoint guardians for minors, to remove them, to direct and control their conduct and to settle their accounts; and to cause the admeasurement of dower to widows.

We propose to treat of these subjects with more or less fullness in separate chapters.

CHAPTER I.

OF PROCEEDINGS BY EXECUTORS OR ADMINISTRATORS, ON THEIR OWN APPLICATION, BEFORE THE SURROGATE, TO OBTAIN AUTHORITY TO MORTGAGE, LEASE OR SELL THE REAL ESTATE OF THE DECEASED FOR THE PAYMENT OF DEBTS.

The surrogate has jurisdiction to grant authority to executors or administrators to dispose of the real estate of the testator for the payment of debts, on the application of the executors or administrators in certain cases; and he has also the like jurisdiction, on the application of a creditor, when the executors or administrators have failed to pay all the debts of the deceased, and have neglected to apply within the time prescribed by law for an order on their own behalf, for such sale or disposition of the realty, to compel them to proceed and obtain such order.

SECTION I.

Of the time and manner of making application for authority to sell, lease or mortgage the real estate of the deceased, on the application of the executors or administrators, and the proceedings thereon, previous to granting the order of sale.

One of the natural consequences of the feudal principles, which prohibited the alienation, and of course the incumbering the fief with the debts of the owner, was to exempt the real estate of the defendant, after judgment, from an execution against his lands. The body of the debtor was liable to be imprisoned for debt, at a

time when his real estate could not be seised. Even lands descended or devised were not, at common law, liable for the simple contract debts of the ancestor or deviser, nor for his specialties, unless the heir was expressly bound. Without adverting to the changes in the law in this respect, in England, it is sufficient to observe that the rule was abrogated in this state by the act of 1786, (1 *Greenl.* 237,) and in all cases heirs were made liable for the debts of their ancestor to the value of the lands descended, whether the debts were created by simple contract or specialty, or whether the heirs were named in the contract or not. The same principle has hitherto been continued a part of our jurisprudence and extended to devisees. (2 *R. S.* 452, § 32.) But the executors or administrators had not, at common law, any control over the lands of their testator or intestate by virtue of their appointment. If, therefore, the personal assets were insufficient to pay the debts of the deceased, the creditor was remediless until some of the statutes allowed the real estate, or some interest in it, to be reached by judgment and execution or by some other statutory proceeding.

But, in this state, the same statute of 1786 which made the lands of the ancestor liable for his debts in the hands of his heirs, conferred on the court of probates the power of appropriating the real estate of the deceased for the purpose of paying debts whenever it should be discovered that the personal estate was insufficient for that purpose. At the revision of the laws in 1800, the same jurisdiction was extended with some limitations to surrogates of the different counties. This system, together with various improvements adopted from time to time, and such others as were suggested by the experience of near half a century, were incorporated into the revised statutes of 1830. Those statutes, and the subsequent enactments on the same subject, contain all that is necessary to notice in this connection.

By the existing law, executors or administrators of any deceased person, after they shall have made and filed an inventory according to law, if they discover the personal estate of their testator or intestate insufficient to pay his debts, may, at any time, within three years after the granting of their letters testamentary or of administration, apply to the surrogate for authority to mortgage,

lease or sell so much of the real estate of their testator or intestate, as shall be necessary to pay such debts. They may also apply for the sale of the interest of the deceased in any land held under a contract for the purchase thereof. (2 *R. S.* 100, § 1, *as amended by act of 1830, p. 391. L. of 1837, ch. 460, § 40. 3 R. S.* 186, 187, 5th ed.)

If the original application is made to the surrogate, within three years from the date of the letters testamentary or of administration, it satisfies the requirement of the act; and the sale and subsequent proceedings may be completed after that period. This is obvious from the language of the section, as well as from the provisions of the fifty-third section, (2 *R. S.* 109,) directing suits commenced against heirs or devisees, after the expiration of that time to be stayed until the conclusion of the proceeding before the surrogate for the sale of the real estate of the deceased. Before the revised statutes, there was no legislative limitation of the period within which an application for the sale of the real estate of the deceased might be made; and this led to great abuses until they were checked by the decision of Chancellor Kent in the case of *Mooers v. White*, (6 *J. Ch. R.* 360,) and by the supreme court in *Jackson v. Robinson*, (4 *Wend.* 436.) The chancellor thought that a single year, after the executor or administrator had entered upon his trust, was long enough to enable him to make the application, and that it should not be made after that time. The supreme court, without fixing any time, held that when the delay had been fourteen years, it was an unreasonable delay, and the surrogate ought not to have entertained the proceeding. But still they thought his error, in that respect, could only be corrected by an appeal. The statute, by fixing three years from the date of the letters, has settled the question for all subsequent cases.

Formerly, and under the acts in force anterior to the revised statutes, the application might be made by any *one* of several administrators, and by parity of reasoning, by any *one* of several executors, without joining their associates. (*Jackson v. Robinson*, 4 *Wend.* 442, *per Marcy, J.*) But there is a change in the phraseology of the revised statutes, giving the power to the executors or administrators, instead of conferring it as in the old

statute on any *one* of the executors or administrators. Under the revised statutes it has been held that *all to whom letters testamentary or of administration have been issued* must unite in the application, and an order of the surrogate, allowing a part of them the authority, is erroneous. (*Fitch v. Witbeck*, 2 Barb. Ch. R. 161. *Sanford v. Granger*, 12 Barb. S. C. R. 392.)

The manner of presenting the application to the surrogate is by petition, duly verified by affidavit. The petition should state, in addition to the fact that an inventory had been returned according to law, 1st. The amount of personal property which has come to the hands of the executor or administrator; 2. The application thereof; 3d. The debts outstanding against the testator or intestate, as far as the same can be ascertained; 4th. A description of all the real estate of which the testator or intestate died seised, with the value of the respective portions or lots, and whether occupied or not, and if occupied, the names of the occupants; and 5th. The names and ages of the devisees, if any, and of the heirs of the deceased. (2 R. S. 100, § 2.) See Appendix, No. 84.)

The surrogate acquires jurisdiction of the *subject matter* by the presentation of the petition and account. (*Sheldon v. Wright*, 1 Seld. 513, per Foote, J. *Sibley v. Wapple*, 2 Smith, 16 N. Y. Rep. 180.) Even previous to the revised statutes, it was not required to recite the preliminary proofs on which the surrogate's jurisdiction depended. (*Sheldon v. Wright*, *supra*.) The act of 1850, p. 117, was passed to relieve the proceedings in surrogates' courts under the provisions of the statutes which we are considering, from the consequences of technical defects, not affecting the merits. Hence, it puts sales conducted under the order of surrogates' courts upon the same footing as the like proceedings of courts having original general jurisdiction; and prohibits sales made in good faith from being invalidated or impeached for any omission or defect in any petition of any executor or administrator under the statutes above referred to, provided such petition shall substantially show that an inventory has been filed, and that there are debts, or is a debt, which the personal estate is insufficient to discharge, and that recourse is necessary to the real estate or some of it, whereof the deceased died seised. It is, however, desirable that the peti-

tion should state, at least, all that is required in the revised statutes.

Although the statement of the foregoing facts gives the surrogate jurisdiction of the subject matter, it does not confer jurisdiction over the *persons of the parties*, whose rights are to be affected by the contemplated disposition of the real estate of the deceased. (*Sheldon v. Wright*, 1 *Seld.* 513.) Hence the necessity of a provision for notifying those interested with the pendency of the proceedings, and affording them an opportunity of shewing cause against them. It is, as has been often well remarked by learned judges, a great and fundamental principle in the administration of justice, that no man can be divested of his rights, until he has had an opportunity of being heard. *Corwin v. Merritt*, 3 *Barb. S. C. R.* 345, and cases cited. *Sheldon v. Wright*, 1 *Seld.* 514.)

If, therefore, it appears to the surrogate by the petition, or other competent evidence, that any of the devisees or heirs of the deceased are minors, the surrogate is required immediately, and before other proceedings, to appoint some disinterested freeholder guardian of such minors, for the sole purpose of appearing for them, and taking care of their interest in the proceedings. (2 *R. S.* 100, § 3.) If the minors are within the county of the surrogate, they are to be served with notice five days previously, of the intention to apply for the appointment of a guardian, that they may be heard in the selection of such guardian. (2 *R. S.* 100, § 4, *as modified by the act of 1837, ch. 460, § 38.* 3 *R. S.* 187, 5th ed.) If, however, the minor has a general guardian in the county of the surrogate, such guardian is to be appointed the special guardian. (*Id.*) Where the minor is under fourteen years of age, the notice must be served on the person in whose custody he may be, or with whom he may live, or on such relative as the surrogate shall designate, instead of the service required by the foregoing section. (*Id.*) (Appendix, Nos. 85, 86.)

It has been already stated in the first part of this treatise, that the surrogate is required to keep a book in which all orders and decrees made by him in relation to the sale of real estate should be recorded. (2 *R. S.* 110, § 60, *Part 1, § 57.*) The order for the appointment of a guardian ad litem should be entered in this book, and a copy thereof, or a regular appointment, under the seal

of the court, be delivered to him. The foregoing requirement to appoint the general guardian, guardian ad litem must be understood with the qualification that such guardian has no interest adverse to that of the minor, for if he has, some other discreet person should be appointed. (2 *Kent's Com.* 229.)

It was the intention of the legislature which revised the statutes, that the application should not be made to the surrogate for the sale of the real estate of the deceased, *until after the executors or administrators should have rendered an account of their proceedings to the surrogate, and the same should have been allowed and settled.* (2 *R. S.* 100, § 1.) Although this would have operated as a check against improvident sales, it would have greatly increased the expense, and have postponed the commencement of the application until after the expiration of eighteen months from the date of the letters testamentary or of administration. It was, therefore, altered by the act of 1830, and the executors or administrators are now allowed to present their petition whenever they discover the personal estate of their testator or intestate to be insufficient to pay his debts.

The petition having been presented, duly verified and filed, and guardians having been duly appointed for such parties in interest as are minors, the surrogate is required to proceed to the further consideration of the matters. If it thus appears to him that all the personal estate of the deceased, applicable to the payment of debts, has been applied to that purpose, and that there remain debts unpaid, for the satisfaction of which a sale may be made under the provisions of the statutes, he is required to make an order, directing all persons interested in the estate to appear before him, at a time and place therein to be specified, not less than six weeks, and not more than ten weeks from the time of making such order, to show cause why authority should not be given to the executors or administrators applying therefor, to mortgage, lease or sell so much of the real estate of the testator or intestate, as shall be necessary to pay such debts. (2 *R. S.* 101, § 5.) The application of the personal estate to the payment of debts, does not necessarily mean that it has actually been paid over to the claimants, but set apart for them. Such seems to be the meaning of the section as explained by the 41st section of the

act of 1837. (*Ch.* 460. 3 *R. S.* 189, § 19, 5th ed.) But the surrogate, by the last mentioned section, is required to have satisfactory evidence that the executor or administrator has proceeded with reasonable diligence in converting the personal property of the deceased into money, and applying the same to the payment of debts.

The surrogate must not only acquire jurisdiction of the *subject matter* by the presentation of the petition and account, but he must also acquire jurisdiction of the *persons of those whose rights are to be affected by the sale*, in order to render his subsequent proceedings valid. This is done by the service of the order to show cause on the parties, and in the manner prescribed by the statute. (*Sheldon v. Wright*, 1 *Seld.* 513. *Bloom v. Burdick*, 1 *Hill*, 139. *Corwin v. Merritt*, 3 *Barb. S. C. R.* 341.)

As the statute contemplates that the claims against the estate should be exhibited, and either rejected or established before the surrogate, on the day of showing cause, and that debts so established shall not be again controverted, unless upon newly discovered evidence, and upon due notice given to the claimant, it would seem, on principle, that the order should require all persons having claims against the estate, to exhibit and prove them before the surrogate on the same day. Without such investigation, it is impossible for the surrogate to decide, understandingly, upon the necessity of a sale, and to satisfy the requirements of the statute. This notice will not, however, supersede the necessity of the notice required by the 40th section, after the sale and the proceeds thereof have been brought into court. (*See* 2 *R. S.* 102, § 13. *Id.* 107, §§ 40, 41, 42. Appendix, Nos. 87, 88, 89.)

The mode of serving the order is prescribed by the act. It must be published, for four weeks, in a newspaper printed in the county, and a copy served, personally, on every person in the occupation of the premises, of which a sale is desired, wherever the same may be situated, and on the widow and heirs, and devisees of the deceased, residing in the county of the surrogate, at least fourteen days before the day therein appointed for showing cause. (2 *R. S.* 10, § 6.)

The widow, however, after her dower has been assigned, is not

a necessary party. By the assignment of her dower, the seisin of the heir is defeated *ab initio*, and the latter is not afterwards considered as having been seised. The widow, after the assignment, not holding under the heir, has no right to appear before the surrogate to show cause why the lands of which her husband died seised, should not be sold for the payment of his debts; the statute giving such right only to heirs and devisees, and persons claiming under them. And an order of the surrogate, directing a sale of the land assigned to the widow for her dower would be void, so far as it related to such land. (*Lawrence v. Brown*, 1 *Seld.* 394.)

If such personal service cannot be made, or if such widow, heirs or devisees do not reside in such county, but reside in the state, then a copy of such order may be served personally, forty days before the day of showing cause, or by publishing the same once in each week, for four weeks in succession, in the state paper. If such heirs or devisees do not reside within this state, or cannot be found therein, the order must be published once in each week, for six weeks successively, in the state paper; or a copy thereof may be personally served on them, at least forty days before the time appointed therein for showing cause. (2 *R. S.* 101, § 7.) If any of the heirs or devisees are minors, the order must be served on their general guardian, or guardian ad litem, as the case may be. It is this service of the order, either personally or by publication, which gives to the surrogate jurisdiction of the persons interested in the land sought to be sold. (*Bloom v. Burdick*, 1 *Hill*, 139.) The act for the protection of purchasers of real estate upon sales by order of the surrogate, passed March 23, 1850, (*L. of 1850*, p. 117,) does not dispense with any requirement calculated to appraise the heirs or devisees of the pendency of the proceedings. By requiring the order to be treated as if made by a court of original general jurisdiction, it shifts the burden of proof from the person claiming under the sale to the party who attacks its regularity. But if the jurisdictional facts be disproved, as, for instance, that no notice was served or published, as required by law, though the purchaser acted in good faith, the sale will be invalid. (*Bloom v. Burdick*, *supra*, and cases before cited.)

At the time and place appointed in the order, and at such other

times and places as the hearing shall be adjourned to, the surrogate, upon due proof of the service and publication of the order, as required by law, should proceed to hear and examine the allegations and proofs of the executors or administrators applying for such authority, and of all persons interested in the estate, who shall think proper to oppose the application. (2 R. S. 101, § 8.)

In this stage of the proceedings the executors or administrators should render a full account of their administration of the personal estate, unless they shall have before rendered and settled their account under the preceding title of the revised statutes. The surrogate is restrained from making an order affecting the real estate of the deceased, unless he is satisfied not only that the personal estate of the deceased is insufficient for the payment of the debts, but also that the executor or administrator has proceeded with reasonable diligence in converting the personal property of the deceased into money, and applying the same to the payment of debts. (2 R. S. 102, § 14 *as modified by L. of 1837, ch. 460, § 41.* 3 R. S. 189, 190, 5th ed. *Moore v. Moore*, 14 Barb. 27.) He must be satisfied that the debts, for the purpose of satisfying which the application is made, are justly due and owing, and that they are not secured by judgment or mortgage upon, or expressly charged on, the real estate of the deceased; or if they be secured by a mortgage or a charge on a portion of the estate, then that the remedies of the creditor, by virtue of such mortgage or charge, have been exhausted. (*Id.* § 14.) As every sale and conveyance made pursuant to these statutes is required to be subject to all charges by judgment, mortgage or otherwise, upon the lands so sold, existing at the time of the death of the testator or intestate, it was necessary that the creditor holding such judgment or incumbrance should not, by virtue of such debt so charged, be an applicant for the sale of the lands on which his debt is a lien. (2 R. S. 105, § 32.)

An order to sell the real estate of the deceased for the payment of debts is a substitute for an action at law, against the heirs or devisees, and is in fact a bar to such action, as far as relates to the lands embraced in the order. (*Id.* 109, § 53.) It presupposes a settlement of the accounts of the executors or administrators in relation to the personal assets, because the heirs or de-

visces are not liable for any debt of the deceased, unless it shall appear that the personal assets of the deceased were not sufficient to discharge them, and after due proceedings in the proper surrogate's court, and at law, the creditor has been unable to collect such debt, or some part thereof, from the personal representatives of the deceased, or from his next of kin or legatees. (2 R. S. 452, §§ 32, 33.) And it is incumbent on the creditor seeking to charge any heirs to show the facts and circumstances thus required, to render them liable. (2 R. S. 453, § 36.)

The statement of the accounts should be as full and ample as is required on rendering a final account, and should be accompanied with an account current. It should be sworn to, and supported by vouchers in the same manner as in analogous proceedings in courts of equity. (*Morris v. Mowat*, 4 Paige, 143.) The surrogate is invested with ample power to ascertain the truth. In addition to such testimony as is admissible at common law, the executors or administrators may be examined on oath, and witnesses may be produced and examined by either party. Process may be issued to compel their attendance and testimony in the same manner and with the like effect as in cases of proving wills before the surrogate. (2 R. S. 101, § 9.) At common law and in equity a judgment against executors or administrators was not evidence against the heir, there being no privity between the personal representatives and the heirs. (*Ferguson v. Broom*, 1 Bradf. 11. *Baker v. Kingsland*, 10 Paige, 366.) Of course, upon common law principles, such judgment would be no evidence before the surrogate of a debt for which he could legally order a sale of the real estate of the deceased. The act of 1837, ch. 460, § 72, as modified by the act of 1843, ch. 172, permits the debt for which the judgment or decree was obtained, notwithstanding the new form it has assumed, to remain a debt against the estate of the deceased to the same extent as before, and to be established in the same manner as if no such judgment or decree had been obtained; and if such judgment or decree was obtained upon a trial or hearing upon the merits, it makes the same *prima facie* evidence of such debt before the surrogate. It must be proved, however, in a legal manner by an exemplification; a mere copy of the docket is not sufficient. (*Baker v. Kingsland*, *supra*.) The

costs awarded against the executor are not a charge against the heirs for which the real estate can be sold. (*Sanford v. Granger*, 12 Barb. 392.)

As the code of procedure does not relate to the practice in surrogates' courts, the rules with respect to the competency and credit of witnesses and other testimony, are those which formerly governed other courts, before the code, except where the legislature have expressly changed the rule, as we have seen they have with respect to the executors or administrators, and judgments against them for a debt of the testator or intestate, obtained after a trial on the merits.

The surrogate's court is not well adapted to the trial of disputed facts. No court where the judge must act in the five-fold capacity of judge, jury, clerk, master and examiner, can reach the same satisfactory result on a controverted question as is generally obtained by a trial conducted according to the course of the common law. This was wisely foreseen by the legislature, and hence the provision that where, upon the hearing, a question of fact shall arise, which in the opinion of the surrogate cannot be satisfactorily determined without a trial by jury, he is authorized to award a feigned issue, to be made up in such form as to present the question in dispute, and to order the same to be tried at the next circuit court to be held in such county. New trials may be granted by the supreme court as in personal actions pending in that court, and the final determination of such issue is made conclusive as to the facts therein controverted, in the proceedings before the surrogate. The costs of the failing party are to be paid on the order of the surrogate, and the payment is to be enforced by him in the same manner as other orders and decrees. (2 R. S. 102, §§ 11, 12.)

The mode of making up the feigned issue, and the proceedings therein, belong to treatises on the practice of the supreme court. The abolition of feigned issues by the code, § 72, has no reference to this question, or to the practice in surrogates' courts.

If a creditor makes out a *prima facie* case of indebtedness of the deceased in his lifetime, there are two classes of persons who have a right to rebut that evidence: (1.) The heirs and devisees have a direct interest in the question; and to remove all doubt as to their right to contest the validity of the claims presented, it is

expressly enacted that it shall be competent for either one of the heirs or devisees of the land in question, and for any person claiming under them, to shew that the executors or administrators have not proceeded with reasonable diligence in converting the personal property of the deceased into money and applying the same to the payment of debts ; to contest the legality and validity of any debts, demands or claims which may be represented as existing against the testator or intestate ; and to set up the statute of limitations as a bar to such claims. The admission of any such claim so barred, by any executor or administrator, shall not be deemed to revive the same, so as in any way to affect the real estate of the deceased. (2 R. S. 100, § 10, as amended by § 72 of the act of 1837, ch. 460, and L. of 1843, ch. 172. *Skidmore v. Romain*, 2 Bradf. 122. *Ferguson v. Broom*, 1 Bradf. 10. *Renwick v. Renwick*, 1 id. 234. *Wilcox v. Smith*, 26 Barb. S. C. R. 316.)

An equitable claim may be set up against the estate of the deceased in cases of this kind, and an equitable defense may be made not only to such equitable claim, but also to a legal claim. (*Id.* and *Matter of Renwick*, 2 Bradf. 80.)

(2.) Any other creditor of the deceased has a right to appear and contest the validity of any other claim. He has such an interest in the fund as to entitle him to the aid of the court in protecting it. (*Mooers v. White*, 6 John. Ch. R. 360.) The proceeding before the surrogate to establish claims against the estate, is analogous to that under the common decree in an administration suit. In the latter case it was held by the master of the rolls, in *Shewen v. Vanderhorst*, (1 Russell and Mylne, 347,) that it was competent for any of the parties interested in the fund to set up the statute of limitations in bar of the claim of a creditor seeking to establish his debt before the master, although the executors refused to interfere. This decision was affirmed on appeal by Lord Brougham, who remarked, that without saying how far the master himself might be entitled to set up the objection, he could see no reason why it might not be taken by a creditor, or a volunteer, as well as by the personal representative. (*Id.* *Moore v. Moore*, 6 J. Ch. R. 360. *Wilcox v. Smith*, 26 Barb. 316.)

If the executor or administrator has a claim in his own favor

against the estate, it should be presented at this time for allowance. He has, by law, no right to retain for his own debt, nor is his claim entitled to any preference over that of other creditors. (2 R. S. 88, § 33. *Treat v. Fortune*, 2 Bradf. 116.) He must make the same proof of the existence and validity of his claim as is required of other creditors; and the statute of limitations, and any other valid defense, may in like manner be interposed against it. (*Williams v. Purdy*, 6 Paige, 166. *Rogers v. Rogers*, 3 Wend. 503.) Like any other creditor, he may remove the bar created by the statute of limitations, by showing a recognition of the debt by the deceased in his lifetime, within the period of limitation, accompanied with a promise to pay it; or, indeed, by such proof as would in a court of law or equity take the debt out of the statute of limitations.

A testamentary provision made by a testator for the payment of debts generally, does not revive a debt upon which the statute of limitations had taken effect before the testator's death. (*Roosevelt v. Mark*, 6 J. Ch. R. 295.)

The testimony when taken by the surrogate in relation to any claim against the estate should be in writing, subscribed by the witness or party examined, and filed. This seems to be necessary in order that it may be returned on an appeal, and thus enable the appellate tribunal to review the decision of the surrogate. (*Fitch v. Witbeck*, 2 Barb. Ch. R. 161.)

The admissions of an executor or administrator of the validity of a debt against the estate, or even a judgment against the executors or administrators by confession or by default, is not evidence of the debt; nor is the latter, after a trial on the merits, only evidence *prima facie*, and that by statute, as has already been shown. Every creditor of the estate, including the executor or administrator, coming to establish his claims against the estate, must make the usual oath that the debt is justly due to him from the estate, after allowing all payments and all proper discounts and offsets. And he must also produce to the surrogate legal evidence of the existence of the debt, unless the same is admitted by those who are interested in the estate. (*Williams v. Purdy*, 6 Paige, 166.)

The demands which the surrogate shall, upon such hearing,

adjudge valid and subsisting against the estate of the deceased ; or which shall have been determined to be valid, on the trial of such issue, or which shall have been recovered against the executors or administrators by the judgment of a court of law, upon a trial on the merits, are required to be entered in the book of his proceedings, fully and at large, and the vouchers supporting the same to be filed in his office. (2 R. S. 102, § 13.) Every order allowing or disallowing a claim against the estate is the subject of an appeal, *to be taken within thirty days*. (2 R. S. 610, § 107. *Bronson v. Ward*, 3 Paige, 189.) The order, therefore, should be entered in the book for sales of real estate, with a schedule subjoined containing a list of the claims allowed, as well as a list of those rejected. (See Appendix, No. 89.) If the entry was neglected at the time, it may be made subsequently *nunc pro tunc*. (*Farrington v. King*, 1 Bradf. 182.)

After being satisfied that the executors or administrators have fully complied with the provisions of the act relative to the administration of the personal assets, and to the service of the order to shew cause, on all who are interested and entitled to such service, in the manner required by law ; that the debts, for the purpose of which the application is made, are justly due and owing, and that they are not secured by judgment or mortgage upon, or expressly charged on the real estate of the deceased ; or, if such debts are secured by a mortgage or charge on a portion of such estate, then, that the remedies of the creditor, by virtue of such mortgage, have been exhausted ; that the personal estate of the deceased is insufficient for the payment of such debts, and that the executor or administrator has proceeded with reasonable diligence in converting the personal property of the deceased into money, and applying the same to the payment of debts. (2 R. S. 102, § 14, *as modified by the act of 1837, ch. 460, § 41. 3 R. S. 189, 5th ed.*) The surrogate is required to ascertain, in the first place, whether sufficient moneys for the payment of the debts can be raised by mortgaging or leasing the real property of the deceased, or any part thereof. (2 R. S. 102, § 15.) This inquiry is conducted in a summary way. It is proper that the executors or administrators should state, in their petition for the aid of the surrogate in the premises,

the mode of disposition of the estate which they deem the best for the interest of all concerned. (Appendix, No. 90.)

Before any order is granted by the surrogate for mortgaging, leasing, or selling the estate, or any part thereof, the surrogate must require adequate security from the executors or administrators. In case the application is for mortgaging or leasing any real estate, the security must be in a bond to the people of this state, with sufficient sureties, at least two, to be approved by the surrogate, in a penalty double the amount to be raised by such mortgage or lease, conditioned for the faithful application of the moneys arising from such mortgage or lease to the payment of the debts established before the surrogate on granting the order, and for the accounting for such moneys whenever required by such surrogate, or by any court of competent authority. If the order applied for is to sell real estate, the surrogate must require a bond in like manner, and with sureties as above directed, in a penalty double the value of the real estate ordered to be sold, conditioned that such executors or administrators will pay all moneys arising from such sale, after deducting the expenses thereof, and will deliver all securities taken by them on such sale, to the surrogate, within twenty days after the same shall have been received and taken by them. (2 R. S. 103, §§ 21, 22.) See Appendix for form, No. 93.

In case of the refusal or neglect of the executors or administrators applying for such order, to execute, within a reasonable time, any bond required as above, the surrogate is required to appoint a disinterested freeholder to execute such mortgage or lease, or to make such sales, who are to execute a bond, similar in all respects to that required of the executors or administrators, in whose place he is appointed. (*Id.* § 23.) In making this appointment, the surrogate should give preference to any person nominated by the creditors of the deceased. (*Id.*)

The person so appointed, on executing and filing the bond, is vested with all the powers and authority, and liable to all the duties appertaining to executors or administrators in relation to the mortgaging, leasing or sale of the real estate of the deceased. (*Id.* 24.)

These bonds, when executed, it will be remembered are to be

proved or acknowledged in the manner in which deeds are to be proved or acknowledged, in order to be recorded.

(See Appendix, Nos. 106, 107, 108.)

SECTION II.

Of granting an order for mortgaging, leasing or selling, the real estate of the deceased, and the proceedings thereon to the consummation thereof.

After the executors or administrators, or the person designated to act in their default, have complied with all the requirements of the act, it is the duty of the surrogate to make an order for mortgaging, leasing, or selling the real estate of the deceased.

The provision, with respect to raising money to pay debts by a mortgage or lease of the lands of the deceased, was first given by the act of 1810, page 10. (*Jackson v. Irwin*, 10 *Wend.* 448, *per Savage, Ch. J.*) It was restricted to cases where there were infants interested in the real estate; and the lease was not to be for a longer time than until the youngest person interested in the estate should become twenty-one years of age. This provision was contained in the revised law of 1813, (*vol. 1*, 453, § 18,) and the authority to direct a lease or mortgage, was made dependent on the opinion of the court of probate or surrogate, that such lease or mortgage would be advantageous to the owners of the estate. The revised statutes do not contain a limitation of the power to raise money by lease or mortgage, to cases where infants are interested in the estate, but they restrict the duration of the lease, in case there are infants, to the period when the youngest infant becomes twenty-one years old; thus retaining, in this respect, this feature of the original act of 1810. It is presumed that money may be raised by lease or mortgage, under the order of the surrogate, as well where all the parties interested are adults, as where the whole, or any part of them, are infants.

There may be cases where it would be for the interest of the parties to raise the money in this way. If the sum to be raised is not large, and the heirs are of age, or nearly so, it would probably diminish the expense, and be most beneficial, to raise the money by mortgage or lease. Such security is equally valid as if made

by the testator or intestate, in his lifetime; and the executors or administrators are not required to make any report of the terms of the lease or mortgage, but may execute the same without any further order of the surrogate. Nor are they required to advertise the premises, but may make a private agreement for such mortgage or lease. The money so raised is not required to be brought into court. Nor is the surrogate to make any order for a distribution of it; but it is to be received by the executors or administrators, and applied by them towards the satisfaction of the debts, established before the surrogate on the granting of the order. (2 *R. S.* 103, §§ 16, 17, 21.) The surrogate has no percentage on the distribution of moneys arising from a mortgage or lease given in pursuance of the order. (2 *R. S.* 642.) The fund thus raised is distributable by the executors or administrators, and they are liable to be cited and compelled by the surrogate to pay the debts of the deceased, established at the time the order was made, and to account for the proceeds of the said lease or mortgage, in the same manner as if the real estate thus leased or mortgaged had been originally personal estate. Obedience to such order may be enforced by imprisonment, as on a final account, or by a suit at law on the bond. (2 *R. S.* 106, § 34.)

The legislature which enacted the revised statutes, in 1830, intended, no doubt, to give a preference to a lease or mortgage over a sale, as a means of raising the necessary funds. At that time, the remedy to enforce the collection of rents was by distress. Since then the constitution of 1846 has prohibited any lease or grant of agricultural land for a longer period than twelve years, where any rent is reserved. (*Const. Art.* 1, § 14.) And the legislature has abolished distresses for rent. It is less advantageous now to raise money by a lease, than it was when the act was originally framed. And it is a proceeding that is very rarely resorted to.

If it appears to the surrogate, as it generally will, that the moneys required cannot be raised by mortgage or lease advantageously to the estate, it is then the duty of the surrogate, from time to time, to order a sale of so much of the real estate, whereof the testator or intestate died seised, as will be sufficient to pay the

debts, which the surrogate shall have entered in his book as valid and subsisting. (2 R. S. 103, § 18.) The debts thus established are in the nature of a judgment.

The sale, under the order of the court, can only affect the title which the deceased had at the time of his death. The purchaser takes it subject to all prior incumbrances and liens. The surrogate has no power to settle a question of conflicting titles, though he may suspend the execution of the order of sale until those disputes are adjusted by the proper tribunal; or, if those interested in the estate prefer it, he may direct the sale to go on, subject to all incumbrances. (*Hewitt v. Hewitt*, 3 Bradf. 265.)

The order, when drawn up, should be entered in the book of sales of real estate. It should recite enough of the proceedings to give the court jurisdiction, both of the subject matter and of the persons of the heirs and devisees, and, in general, to show a compliance on the part of the executors or administrators, with the requirements of the statute. (*Atkins v. Kinman*, 20 Wend. 250, per Cowen, J. and see Appendix for form of the order.)

Since the passing of the act of 1850, for the protection of purchasers of real estate upon sales by order of the surrogate, (*L. of 1850*, p. 117,) the title of purchasers in good faith cannot be impeached by reason of any omission, error, defect, or irregularity in the proceedings before the surrogate, or by an allegation of want of jurisdiction on the part of the surrogate, except in the manner, and for the causes, that the same could be impeached or invalidated in case such sale had been made pursuant to the order of a court of original general jurisdiction. These orders are, therefore, substantially placed on the same footing with orders for the sale of real estate, in analogous cases, by the late court of chancery or the supreme court. Nevertheless, it is desirable that they should contain, in brief terms, a recital of the proceedings which led to the granting of them.

There are some statutory requirements with regard to the contents of the order, and the direction which it shall contain, borrowed from the practice of the courts of equity. Thus, if the real estate consists of houses or lots, or of a farm, so situated that a part thereof cannot be sold without manifest prejudice to the heirs or devisees, then the whole, or a part thereof, although more than

may be necessary to pay such debts, may be ordered to be sold; and if a sale of the whole real estate shall appear necessary to pay such debts, it may be ordered accordingly. (2 *R. S.* 103, § 19. *Jackson v. Irwin*, 10 *Wend.* 441.)

The order must, in all cases, specify the lands to be sold, and the surrogate may direct the order in which several tracts, lots or pieces, shall be sold. If it appears that any part of the real estate of the deceased has been devised, and not charged in such devise with the payment of debts, the surrogate is required to order that the part descended to heirs shall be sold before that devised. If it appears that any lands, devised or descended, have been sold by the heirs or devisees, then the lands remaining in their hands unsold, shall be ordered to be first sold; and in no case shall land devised, expressly charged with the payment of debts, be sold under any order of a surrogate. (*Id.* § 20. *Eddy v. Traver*, 6 *Paige*, 521.) These principles are the same as those adopted by courts of equity in marshalling securities among creditors, and of assets amongst parties in distribution. (*Willard's Eq. Juris.* 337. *Id.* 561.)

Under the statute of 1801 it has been supposed that the executors or administrators might sell at *private* as well as at *public* sale. They must, however, have sold for *cash*. (*Jackson v. Irvin*, 10 *Wend.* 446, *per Savage*, *Ch. J.* *Maples v. Howe*, 3 *Barb. Ch. R.* 611.) The present statute, however, requires the sale to be in the county where the lands are situated, and at public vendue, between the hour of nine in the morning and the setting sun of the same day. (2 *R. S.* 104, § 26.) And the sale may be on a credit, not exceeding three years, for not more than three-fourths of the purchase money, as shall seem best calculated to produce the highest price, and as shall have been directed by the surrogate, or shall be approved by him; the moneys, when the sale is on credit, are to be secured by a bond of the purchaser, and a mortgage of the premises sold. (*Id.* § 28.) It was said by the chancellor, in *Maples v. Howe*, *supra*, that when the creditors wish to have the property sold on credit, the most proper course would be to suggest it to the surrogate at the time of making the order, so that he might inquire into the situation of the property, and the claims of the various creditors, and give the proper direc-

tions. Although the wishes of the creditors in this respect should not be entirely disregarded, yet it is believed that the surrogate can, against their recommendation, authorize a credit within the limits of the act, if he believes that course best calculated to produce the highest price. This order ought to be obtained from the surrogate before the sale is made.

Whenever a sale is ordered, a duly authenticated copy of the order should be delivered to the executors or administrators, and it then becomes their duty to cause the premises embraced in the order to be sold at public auction. For this purpose notice of the time and place of holding the sale is required to be posted for six weeks at three of the most public places in the town or ward where the sale shall be had; and to be published in a newspaper, if there be one printed in the same county, and if there be none, then in the state paper for six weeks successively. The lands and tenements must be described in the notice with common certainty, by setting forth the number of the lots, and the name or number of the township or towns in which they are situated. If the premises cannot be so described, they must be described in some other appropriate manner, and in all cases the improvements thereon, if any, must be stated. (2 R. S. 104, § 25.)

As a departure from the requirements of the statute in conducting these sales, will always cast a cloud over the title, even when it does not invalidate it, a strict and cautious obedience to these directions should be followed by the executors or administrators.

When the sale is made, the terms of it should be reduced to writing and be subscribed by the purchaser. It should always be a condition that a deed is not to be given until an order of confirmation shall have been granted by the surrogate.

It is a wise principle in morals, as well as in equity jurisprudence, that a man standing in confidential relations to others should refrain from so acting that his self interest would conflict with his integrity. The law, therefore, prohibits a party from purchasing, on his own account, that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. (*Willard's Eq. Juris.* 605, 606, and cases there cited.) The statute has applied these principles to the sales under the order of the surrogate, and

prohibited the executors or administrators, and the guardian of any minor heirs of the deceased, from becoming a purchaser, directly or indirectly, or from being interested in the purchase of any part of the real estate so sold. All sales made contrary to the provisions of that section of the act are declared to be void; but an exception is made in favor of a purchase by a guardian for the benefit of his ward. (2 R. S. 105, § 27.)

The sale having been duly made, it is then the duty of the executors or administrators, or other person by whom the sale was conducted, to make a return of their proceedings, upon the order of sale, to the surrogate granting the same. This return should be in writing; and should set forth the circumstances attending the sale, and the facts showing a compliance with the statute, and be accompanied with affidavits of due service and publication of the notice of sale. The return should be verified by the affidavit of the executors or administrators, or of the person who conducted the sale. (2 R. S. 105, § 29.)

The statute evidently contemplates that parties may appear before the surrogate and oppose this confirmation, and apply to open the biddings. It has, however, made no provision for notice to be given of the time when the return will be made. If no one objects to the confirmation, and the proceedings appear to have been regularly and fairly conducted, the surrogate has a right to assume that the executors or administrators represent the parties in interest, and he will be warranted in confirming the sale, and directing conveyances to be executed. But the heirs may desire to be heard against a confirmation, and the purchaser against the opening of the biddings. Perhaps the better remedy for supplying this omission is that suggested by the chancellor in *Delaplaine v. Lawrence*, 10 Paige, 604, that such of the parties as wish to be heard should file a caveat with the surrogate, and request that he might be notified of the time of hearing. This is analogous to the proceedings before masters under the old chancery practice, when sales were conducted by them. The purchaser was entitled to a hearing upon the question whether the sale should be set aside or confirmed. (*Id.*)

On receiving the return, the surrogate is required to examine the proceedings; and for this purpose, he may examine the

executors or administrators, or any other person on oath touching the same. If he is of opinion the proceedings are unfair, or that the sum bid is disproportionate to the value, and that a sum exceeding such bid, at least ten per cent, exclusive of the expenses of a new sale, may be obtained, he is required to vacate the sale and direct that another be had. The subsequent sale, if ordered, must be conducted in all respects like that on the first order, and be had under the like notice. (*Id.* § 29.) (For forms of order of sale, report and order of confirmation, see Appendix, Nos. 90, 91, 92.)

This practice of opening biddings and directing a re-sale of the premises, is borrowed from that of the court of chancery, and should be exercised with great caution. (*Duncan v. Dodd*, 2 *Paige*, 99.) A suspicion on the part of the bidders that the sale will not be confirmed and that the premises will be again exposed to sale, tends to repress competition, and to dampen the ardor of those who conduct the sale. In England it is almost a matter of course to open the biddings, on a master's sale, before the confirmation of his report, upon the offer of a reasonable advance on the amount bid, and the payment of the costs and expenses of the purchase. As a general rule, an advance of ten per cent is sufficient to authorize a re-sale; but the biddings will not be opened when the amount of the advance is less than forty pounds sterling. (4 *Mad. Ch. R.* 460.) The policy of the English practice was strongly questioned by Lord Eldon in *Williams v. Attleborough*, *Turner's Rep.* 75, and it has been adopted in this state only in cases where the reasons for the equitable interposition of the court are strong and powerful. (*Duncan v. Dodd*, *supra*, and cases there cited. 3 *John. Ch. R.* 292.) In a recent case in the court of appeals, it was held that to authorize the vacating of the sale, it must be made to appear, either that it had been unfairly conducted, or that the sum bid was disproportionate to the value of the property, and that at least ten per cent, exclusive of the expenses of the new sale, may be obtained in addition to the sum bid. Both must concur; because, if the sum bid is not disproportionate to the value, the sale should not be set aside on an offer of ten per cent more. The object is not speculation,

but to obtain the fair value of the property. (*Kain v. Masterton*, 2 *Smith*, *N. Y. Rep.* 175. *Dalaplain v. Lawrence*, 3 *Comst.* 301.)

If, however, it appears to the surrogate that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or, if disproportionate, that a greater sum than at least ten per cent, exclusive of the expenses of a new sale, cannot be obtained, he is required to make an order confirming the sale, and directing conveyances to be executed. (*Horton v. Horton*, 2 *Bradf.* 200. 2 *R. S.* 105, § 30.)

It must be here remembered that the sales and conveyances are subject to all charges by judgment, mortgage, or otherwise, upon the lands so sold, existing at the time of the death of the testator or intestate. (*Id.* § 32.) And hence, if the testator charges the payment of his debts on his real estate, by his last will and testament, the surrogate has no jurisdiction to order a sale of the lands so charged. The remedy of the creditor to enforce such charge is in equity. Hence, too, if there be legacies charged upon the real estate, the purchaser takes his title subject to the payment thereof.

With respect to what direction in a will constitutes a valid charge upon the real estate, in favor of creditors or legatees, a few words only can be added. The limits of this treatise will not admit of a full discussion of it, and it belongs more appropriately to works on equity jurisprudence, and the doctrine of wills. In general, it may be said, that the personal estate is the primary fund to pay both debts and legacies, and that a mere direction in the will to the executors to pay the debts of the testator, or the legacies, is not sufficient to charge the real estate. (*Lupton v. Lupton*, 2 *J. Ch. R.* 614, 624.) There must be some other language, in the absence of an express charge, as where the testator devises his estate, "after payment of debts," or "his debts being first paid," or the like. (2 *Story's Eq. Juris.* § 1246. *Willard's Eq. Juris.* 487 to 490. *Jarman on Wills*, ch. 46, 2 vol. 364, et seq. *Perkins ed. and the cases cited and notes.* *Reynolds v. Reynolds*, 2 *Smith*, 259, 16 *N. Y. Rep.*) The usual clause in a will devising and bequeathing the *residue* is not alone sufficient to make either the debts or legacies a charge upon the realty. Nor is the blending of the real and personal estate in one devise in the same

clause in the will. (*Reynolds v. Reynolds, supra.*) In all the cases where the lands covered by a residuary devise have been held chargeable, there has been something besides a mere bequest or direction to pay debts. (*See Lupton v. Lupton, supra, and the cases before cited.*) Such was the case in *Awbrey v. Middleton*, 2 *Eq. Ca. Abr.* 497. *Mirehouse v. Scaife*, 2 *Myline and Cr.* 695, and *Lewis v. Darling*, 16 *Howard's U. S. Rep.* 1.

But the sale under the order of the surrogate extinguishes all claim for dower of the widow of the testator or intestate. (2 *R. S.* 105, § 31.) If the widow of any former owner of the land has a claim therein for dower, it remains unaffected by the sale, and her remedy continues against the land as before. It is the dower only of the widow of the *testator or intestate* that is cut off by the sale, and for which an adequate compensation is subsequently made. But if the dower has been assigned to the widow before the sale, it cannot be sold under the order, so as to affect her. (*Lawrence v. Miller*, 2 *Com.* 245.) The land should then be sold subject to her life estate therein. (*Maples v. Howe*, 3 *Barb. Ch. R.* 611.)

The conveyances are to be executed by the executors or administrators, or by the person appointed by the surrogate to make the sale. They are required to contain and set forth, at large, the original order authorizing a sale, and the order confirming the sale, and directing the conveyance. For this purpose, therefore, a copy of the order confirming the sale and directing a conveyance, duly authenticated under the seal of the court, should be delivered to the person conducting the sale. (*Id.* § 31. See Appendix, No. 94, for form of deed.)

The effect of the statute of 1850, ch. 82, upon the regularity of sales in cases of this kind has already been noticed. It is desirable to avoid the irregularities alluded to in the statute, as they will always form a cloud upon the title. (3 *R. S.* 192, 5th ed.)

It has already been observed, that the surrogate is authorized *from time to time* to order a sale of so much of the real estate whereof the testator or intestate died seised, as shall be sufficient to pay the debts, which he shall have entered in his book, as valid and subsisting. (2 *R. S.* 103, § 18.) If the avails of the first sale are not sufficient for this purpose, a further order of sale

may be made, without commencing an original application. The executors or administrators in such a case, apply on the foot of the first decree. Such application can be made after the lapse of three years from the date of the letters testamentary or of administration, if the original application was made within that period. It is, in effect, but a continuation of the same proceeding. (Appendix, 104, 105.)

The authority imparted by the surrogate's order to an executor or administrator, to sell the real estate of the deceased, is a mere naked power, not coupled with any interest. A contract, therefore, by an administratrix to convey lands of her intestate, when a surrogate's order for that purpose should be obtained, does not vest an interest, though an order be afterwards obtained. Such a contract is void, and incapable of being enforced either at law or in equity, not only on account of a want of interest in the administratrix, but also as being contrary to public policy. (3 Cowen, 302, *per Sutherland J.*)

The proceedings do not abate by the death of the executors or administrators, or other person named in the order, or their removal or disqualification, while the order of sale remains unexecuted in whole or in part. The surrogate is authorized to empower the administrator *de bonis non* of the original testator or intestate, with the will annexed, or otherwise, or a disinterested freeholder, as in the case of the original order, to execute the said order in the same manner and with the like effect, as if such death or disability had not occurred, on their giving the like security. (*Law of 1850, ch. 160.*)

The provisions of the statute relative to the lease, mortgage or sale of the real estate of the deceased for the payment of his debts, which have hitherto been considered, are confined to the *real estate of inheritance* of which the deceased was *legally seised*, at the time of his death. A mere chattel interest or an estate *pur auter vie*, vests in the executors or administrators as assets, without any order of sale from the surrogate. (2 R. S. 82, § 6, *sub. 1.*)

It remains, therefore, to consider that species of interest in land which arises from a *contract of purchase*, by the deceased in his lifetime, before the legal title is conveyed by the vendor. This

interest receives its denomination from the quantity of estate purchased. If that is an estate of inheritance, the title which passes to the purchaser is deemed an equitable freehold of inheritance, and subject to the rules of descent which govern the transmission of a legal freehold of inheritance. (1 R. S. 754, § 27.) If, therefore, the testator or intestate is possessed of a contract for the purchase of land, and dies before a title is conveyed to him by the vendor, his interest under such contract and in such land descends to his heirs, and does not vest in his executors or administrators. The heirs alone can complete the purchase; though they had, at common law, a right to compel the executors or administrators to pay the purchase money, left unsatisfied by the deceased out of the personal estate. (*Champion v. Brown*, 6 J. Ch. R. 398.)

The statute which requires the heir or devisee to remove an incumbrance on the estate descended or devised, without resorting to the executor or administrator of his ancestor, unless there is an express direction in the will, throwing the incumbrance on the personal estate, relates to a *mortgage* by name, and does not specify any other lien or incumbrance. (1 R. S. 749, § 4.) The lien of the vendor for the purchase money is in the nature of an equitable mortgage, and it seems to me falls within the same reason, and should be discharged by the heir or devisee of the vendee, without resorting to the personal representatives of the deceased.

The interest which the deceased has in land which he has contracted to purchase, and for which no conveyance has been given by the vendor, may be sold under an order of the surrogate, on the application of the executors or administrators, or of any creditor in the same case, and in the same manner, as if he had died seised of the land; and the same remedy is extended by the act of 1837, ch. 460, § 42, where the deceased was the assignee of the contract for the purchase of land, as when he was the original purchaser; and the same proceedings are to be had in conducting the sale as in other cases. The sale must be made subject to all payments thereafter to become due on the contract. If there are future payments to be made, the sale must not be confirmed by the surrogate until the purchaser shall execute a bond to the execu-

tors or administrators of the deceased, for their benefit and indemnity, and for the benefit and indemnity of the persons entitled to the interest of the deceased in the lands so contracted for, (i. e. the heirs or devisees,) in a penalty double the whole amount of payments thereafter to become due on such contract, with such sureties as the surrogate shall approve, conditioned that such purchaser will make all payments for such lands that shall become due after the date of such bond, and will fully and amply indemnify the executors or administrators of the deceased, as the case may be, and the persons so entitled against all demands, costs, charges and expenses, by reason of any covenant or agreement contained in such contract, or by reason of any other obligation or liability of the deceased, on account of the purchase of such lands, and against all other covenants and agreements of the deceased to the vendor of such land in relation thereto. (2 *R. S.* 111, 112, §§ 66, 67. 3 *id.* 199, 200, 5th ed.) If, however, there are no payments which become due after the purchase, no bond is required of the purchaser. (2 *id.* 111, § 68.)

On confirming the sale, the surrogate, instead of ordering a deed to be given to the purchaser, directs the executors or administrators of the deceased, to execute an assignment of the contract to the purchaser. Such assignment vests in the purchaser, his heirs and assigns, all the right, interest and title, of the persons entitled to the interest of the deceased in the land sold, at the time of the sale; and the purchaser has the same rights and remedies against the vendor of the land, as the deceased would have had if he had lived. (*Id.* 69.)

The surrogate may order only a part of the land so contracted for to be sold; in which case the purchaser is not required to execute a bond. (*Id.* § 70.)

The money arising from the sale is to be brought into court, and the surrogate is required to distribute it as in other cases, after paying all charges, and satisfying any claim of dower which the widow of the deceased may have upon the lands sold. (*Id.* § 71.)

A widow is not strictly entitled to dower, as such, except in lands of which her husband was seised, of an estate of inheritance, at sometime during the coverture. (1 *id.* 740.) The claim for dower, in the case of a contract to purchase lands, is declared to

extend only to the annual interest, during the life of the widow, upon one third of the surplus money arising from the sale, which shall remain after paying all sums of money due from the deceased, at the time of the sale, for the land contracted and sold. (2 *id.* 112, § 72.)

SECTION III.

Of distribution of the avails of the real estate of the deceased, leased, mortgaged or sold, under the order of the surrogate.

In cases where the premises have been leased or mortgaged under the order of the surrogate, the executors or administrators, we have seen, make the distribution of the avails among the creditors of the deceased, and they are liable to be cited before the surrogate to account.

But when the whole, or any part of the real estate of the deceased, is sold by virtue of an order of the surrogate, the moneys arising from such sale must be brought into the office of the surrogate granting the order, for the purpose of distribution, and are to be retained by him for that purpose. (2 *R. S.* 103, § 35.)

The principles on which distribution is to be made, are pointed out in the statute. The surrogate, in the first place, is required to pay out of the moneys the charges and expenses of the sale. These embrace not only the surrogate's fees, but also the just allowances to be made to the executors or administrators for their time and disbursements. In the next place, he is required to satisfy any claim of dower which the widow of the testator or intestate may have upon the lands so sold. The widow, it is provided, is entitled to reasonable notice of the payment of the avails of the sale into court, in order that she may elect either a sum in gross or an annuity for life. The statute does not prescribe the length of the notice. The reasonableness, therefore, of the notice must be left to be determined by the surrogate, on a view of the facts in the case. If the widow elects a sum in gross, upon the principles of law applicable to annuities, as a reasonable satisfaction for her claim, she must sign an instrument, in writing, consenting to accept such sum in lieu of her dower. This instrument must be acknowledged or proved in the same manner as deeds entitled to be recorded, and

be preserved by the surrogate among the papers in his office. (2 R. S. 186, §§ 36, 37. See Appendix as to form, 99 to 102.)

If, after reasonable notice for that purpose, no such consent is given, the surrogate is required to set apart one third of the purchase money to satisfy the claim of the widow, and to cause it to be invested in permanent securities, on annual interest, in his name of office, and the interest is to be paid to the claimant during life. (*Id.*)

The supreme court has adopted the Portsmouth or Northampton tables, as affording the rule to ascertain the present value of the widow's dower. (See do. in Appendix, 103.)

Having paid the expenses of the sale, and satisfied the claim for dower, the balance of the proceeds is to be distributed among the creditors, in proportion to their respective debts, without giving any preference to bonds or other specialties, or to any demand on account of a suit being brought thereon. (*Id.* § 38.) In this distribution, the legislature adopt the maxim that equality is equity, rather than another maxim, which is good enough in its place—*Qui prior est tempore, potior est jure.*

But before the making of distribution, notice of the time and place of making it must be published, for six weeks successively, in the county where the surrogate resides. He may also publish such notice, in such other newspaper, as he may deem most likely to give notice to the creditors. (2 R. S. 107, § 40.) An order should be entered in the book of sales of real estate, appointing the time and place for making the distribution, and directing the creditors of the deceased, whose claims have not been before presented, to exhibit and prove them before the surrogate. (Appendix, No. 95.)

At the time and place appointed, and at such other times and places as the surrogate shall appoint for that purpose, he is required to proceed to ascertain the valid and subsisting debts against the testator or intestate, and to hear the proofs and allegations of the claimants of such debts, and of the executors or administrators, heirs, devisees, or any other persons interested in the estate of the deceased, or in the application of the proceeds of the sale. (*Id.* § 41.)

It has been remarked in a preceding section of this chapter, that the appropriate time to exhibit the claims against the estate, is on the application for the sale. The service of the order to show cause is better calculated to inform the parties interested in the estate of the deceased, of the measures in contemplation, and to enable them to protect their respective interests, than the notice of distribution. Still, however, any debts or demands, not presented on the first hearing, may be presented at this time; and are entitled to be allowed on being proved to the satisfaction of the surrogate. Debts established on the first hearing are not again to be controverted except on newly discovered evidence, and then only, on due notice to the claimant.

As the proceeding to sell the real estate of the deceased for the payment of his debts, is a substitute for an action against the heirs or devisees, it is obvious the latter should be entitled to make the same defense against any claim exhibited against the estate, either on the application to sell, or on the day of distribution, which would be permitted in a court of law or equity in an action against them on the same demand. Hence, payment, the statute of limitations, &c. may be set up by the heir, or devisee, or any claiming under them, and in a proper case, a feigned issue may be ordered by the surrogate, to enable the parties to submit their defense to a jury. (2 R. S. 102, § 11; 107, § 42.) Any equitable defense also, may be allowed. (*Matter of Wm. Renwick*, 2 Bradf. 80. *Payne v. Mathews*, 6 Paige, 10. And see ante, § 1 of this chapter, and the cases cited.)

As the parties in interest may appeal from the order of the surrogate, either in allowing or rejecting any claim presented against the estate, an order should be entered in the book of sales on establishing or rejecting such claims. And a schedule containing a list of the claims allowed, and another containing a list of those rejected should be subjoined to the order. (Appendix, No. 97.)

It is no objection to an indebtedness founded on a valuable consideration that it is not due at the day of distribution. The creditor to whom such demand belongs is entitled to receive his proportion with other creditors after deducting a rebate of legal

interest upon the sum distributed for the unexpired time of the credit. (2 *R. S.* 107, § 39.)

The revised statutes contemplate that the creditors of the deceased, whose debts have acquired no legal priority, should be paid ratably as well out of the personal as the real assets. If, therefore, the executors or administrators have made an unequal distribution of the personal assets among the creditors, by paying some more and others less than their share, the surrogate should so marshal the avails of the real estate, if they are insufficient to pay all, that each of the creditors will, in the aggregate, receive no more than his ratable proportion. (*Livingston v. Newkirk*, 3 *John. Ch.* 318.) The doctrine of courts of equity with respect to marshalling assets in behalf of legatees, creditors and distributees, and that of marshalling securities in favor of creditors and sureties, is applicable to surrogates' courts in cases of this kind. For the doctrine itself and some of the cases by which it is illustrated, see *Willard's Eq. Juris.* § 14 of ch. 7, p. 561, *et seq.* *Couch v. Delaplaine*, 2 *Comst.* 397.

A distribution sheet should be made out and entered in the book of sales containing the name of each claimant, the whole amount of his debt, and the sum to which he is entitled.

If the proceeds of the sale exceed the debts and expenses, the surplus must be distributed to the heirs and devisees of the testator or intestate, or the persons claiming under them, in proportion to their respective rights in the premises sold. (2 *R. S.* 107, § 43. *Sears v. Mark's assignees*, 2 *Bradf.* 394.) The original petition will afford the surrogate the requisite evidence as to the names of the persons claimed to be heirs or devisees, unless the facts therein stated are controverted. Any dispute in relation to the persons entitled to the overplus, must necessarily be settled by the surrogate, at the time distribution is made. The order of the surrogate in this respect, is the subject of appeal, and should be entered in the book of sales of real estate.

If the sale is on a credit as to a part of the consideration, the securities taken must be returned to the surrogate, and be kept by him in his office. It is his duty to collect the moneys due thereon, from time to time, and to distribute and apply the same

among the creditors, *whose debts were established before him*, in the same proportion, as is directed respecting the moneys arising on such sale. (*Id.* § 44.) In case any portion of such surplus money belongs to a minor, or to a person who has only a temporary interest in said money, and the reversionary interest belongs to another person, the surrogate is required to make such order for the investment, and the payment of the interest and of the principal, as the supreme court is authorized to do in analogous cases. The investments in such cases are required to be secured by mortgage upon unincumbered real estate, within this state, worth at least double the amount of such investment, exclusive of buildings thereon, in the name of the office of the surrogate, and he is required to keep the securities in his office, and to distribute the interest and principal in conformity to the order under which the investment is made, and to the person or persons entitled thereto. (*L. of 1850, ch. 150, § 1 and 2. 3 R. S. 195, 5th ed.*)

He is also required to keep in his office, as a part of his official papers, the securities taken by him, on the investment of a principal sum, at annual interest, to satisfy a dower claim. These securities are to be delivered to his successor in office. And it is his duty to collect such interest, and pay the same to the person entitled thereto. (*2 R. S. 107, § 45.*)

After the death of the person entitled to such interest, the principal sum must be collected, and, after deducting the costs and charges of the surrogate in the management, collection and distribution thereof, the residue must be distributed among the creditors of the deceased, *who shall have established their debts previous to the original investment* of the principal sum, in the same manner, and with the like effect as is provided for the distribution of the sales of real estate. (*Id.* § 46.)

If there is any surplus remaining after such distribution, it is directed to be divided among the heirs and devisees of the testator, or the heirs of the intestate, or the persons claiming under them, in proportion to their respective rights in the premises sold. (*Id.* § 47.)

It seems to be the policy of the act to apply the moneys arising from the first sale to the payment of the debts proved before the

surrogate on the first application, or established before him on the day appointed for the first distribution, or on the day to which it may be adjourned. Those creditors seem to have acquired by their vigilance, a lien upon the fund, which ought not to be disturbed by the appearance of debts not presented on either of the foregoing occasions. If it was in the power of the surrogate to open his decree for final distribution, on the appearance of every new debt, the policy of the measure might well be questioned. It would lead to great delay and expense. And, as no means are pointed out to notify those interested in the estate of the presenting a new claim, that they might appear and contest it, the investigation of its validity and merits would almost always be *ex parte* and imperfect. Hence, the doubtful and unjust claims would always be withheld until after the hearing under the notice of distribution.

It is believed, however, that the surrogate cannot open his decree for distribution, after it is made ; and it, therefore, necessarily follows, that all the avails of the first sale, whether the payment of a part is postponed to a future day, or invested to secure a dower claim, must ultimately be paid towards the satisfaction of the debts established on the first or second hearing.

The effect of the sale of the real estate on debts not presented to the surrogate, and allowed, and on the heirs and devisees, may be gathered from a view of other provisions of the act. It has already been shown that, during the three first years succeeding the date of the letters testamentary, or of administration, the heirs and devisees are not liable to be sued by any creditor of the deceased. (2 *R. S.* 109, § 53.) *Butts v. Genung*, 5 *Paige*, 254. *Wilson v. Wilson*, 13 *Barb.* 252.) By the 33d section (2 *R. S.* 105) it is enacted that if the proceeds arising from the mortgage, lease, or sale of any lands, made pursuant to the order of any surrogate, which shall be paid over to the surrogate, shall be sufficient to pay all the debts established before the surrogate, on granting the order, the heirs and devisees of the testator or intestate, and all the remaining lands of which he died seised, shall be exonerated from all claim, or charge by reason of such debts so established. If the proceeds shall not be sufficient for that purpose, the heirs and devisees, and the remaining land, shall be exonerated from

such debts, in proportion to the sum raised, and paid over. Hence, after the termination of the proceedings before the surrogate, the heirs and devisees become liable to the creditors whose debts are unpaid, whether allowed by the surrogate or not, to the extent of the real estate received by them, by descent or devise. But if the sale under the surrogate's order embraced all the real estate of which the deceased died seised, and the avails were all exhausted in paying the debts and expenses, it would seem that the creditor who omitted to present his claim to the surrogate for allowance at the proper time, is remediless. There is no provision in the act authorizing him to require the creditors whose debts have been paid to refund a proportional part. Having received their debts, or a ratable share thereof, under the decree of a court of competent jurisdiction, they are entitled to avail themselves of the fruits of their superior vigilance.

By the *act of 1844, ch. 300, § 2*, the surrogate was allowed for distributing any money brought into his office on the sale of real estate, two per cent; but such commission was not in any case to exceed twenty dollars for distributing the whole money raised by such sale; and no executors or other persons authorized to sell any real estate by order of any surrogate, are allowed any commission for receiving or paying to the surrogate the proceeds of such sale; but they are allowed their expenses in conducting such sale, including two dollars for every deed prepared and executed by them thereon, and a compensation not exceeding two dollars a day for the time necessarily occupied on such sale. (*3 R. S. 921, 5th ed.*) Since 1847, surrogates have been compensated by a stated salary, and the fees of the office are accounted for by them to the county treasurer of their respective counties.

In contests relative to the validity of claims presented against the estate of the deceased, the surrogate may award costs to the party in his judgment entitled thereto, to be paid either by the other party, personally, or out of the estate which is the subject of controversy. (*2 R. S. 223, § 10.*) By the laws of 1837, p. 536, it was provided that in all cases where the surrogate is authorized by law to award costs, he shall tax them at the same rate allowed for similar services in the courts of common pleas. The rates allowed at that time in courts of common pleas, were the same as

the common pleas costs established by the revised statutes of 1830. Notwithstanding those courts have since been abolished by the present constitution, it has been held by the learned surrogate of New York, in *Western v. Romaine*, 1 *Bradf.* 37, that the old common pleas fee bill is still to be followed in the taxation of these costs as far as it is applicable. (*See also Burtis v. Dodge*, 1 *Barb. Ch. R.* 91.) It would, in many cases, be inequitable, to require the estate to sustain the expense of resisting unjust demands, presented to the surrogate for allowance. The power of subjecting the unsuccessful party to the payment of costs, should be so exercised that while it will protect the estate against stale and unfounded claims on the one hand, it will restrain the executors, or other persons, conducting the proceedings, from resisting, without reason, such as are meritorious.

The proceedings on distributing the avails of an equitable freehold, sold under the order of the surrogate, are in substance the same as those which we have been considering. The surrogate, however, in the first instance pays the vendor such sum as is due on account of the contract, and distributes the balance among the creditors of the deceased. The surplus, after paying debts and expenses, is to be paid to the persons who would have been entitled thereto, if there had been no sale, in proportion to their respective rights in the premises sold. These persons have been before shown, to be the heirs or devisees of the deceased. (2 *R. S.* 112, § 73.)

Where a portion only of the land so contracted is sold, the executor or administrator is required to execute a conveyance therefor to the purchaser, which shall transfer to him all the rights of the deceased to the portion so sold, and all the rights which shall be acquired to such portion, by the executor or administrator, or by the persons entitled to the interest of the deceased in the land sold, at the time of the sale, on the perfecting of the title to such land, pursuant to the contract. (*Id.* § 74.)

Upon the payment being made in full, on a contract for the purchase of land, a portion of which shall have been sold, according to the preceding provisions, the executors or administrators of the deceased are declared to have the same right to enforce the performance of the contract which the deceased would have had if he had

lived; any deed that shall be executed to them, shall be in trust, and for the benefit of the persons entitled to the interest of the deceased, subject to the dower of the widow, if there be any; except for such part of the land so conveyed as shall have been sold to a purchaser, according to the preceding provisions; and as to such part the said deed shall enure to the benefit of the purchaser. (*Id.* § 75.)

The foregoing provisions of the act are sufficiently plain, and do not seem to have led to any controversy.

We have hitherto considered only those cases of distribution where the fund has been created by a sale of real estate, or equitable interests, in pursuance of the *order of the surrogate's court*. But there is another class of cases where the fund is permitted to be brought into the same court for distribution, upon the like principles. Those cases are where the real estate of the testator, or some interest therein, has been devised to the executors to be sold by them; or where they have been authorized to sell either for payment of debts or legacies. In the first of these classes, if any one or more of the executors neglect or refuse to take upon him the execution of the will, the sale by any such as do take upon themselves the execution of the will, is equally valid as if the others had joined in the sale. (2 *R. S.* 109, § 55. *Ogden v. Smith*, 2 *Paige*, 197, 8. *Sharp v. Pratt*, 15 *Wend.* 610.) The result is the same on the death of one of several executors; the survivors can execute the trust. But if one or more be removed by the court, or his resignation be accepted, the remainder cannot execute a power of sale so as to vest a good title in the purchaser. (*In the matter of Van Wyck*, 1 *Barb. Ch. R.* 565.)

The right of those who qualify to execute the power, when a part renounce, applies as well to *discretionary* as to *peremptory* powers of sale. (*Taylor v. Morris*, 1 *Comst.* 341.) But the power in this class of cases cannot be exercised on the death of the last surviving executor by an administrator, with the will annexed. (*Dominick v. Michael*, 4 *Sandf. S. C. R.* 374.) Such administrator succeeds merely to the rights, powers and duties, of the executors, in relation to the *personal estate*, and not to any power over the real estate. (*Id.*)

Unless it be otherwise directed in the will, such sales may be public or private, and on such terms as, in the opinion of the executor, shall be most advantageous to those interested therein. (*L. of 1837, ch. 460, § 43. 3 R. S. 197, 5th ed.*)

There is no doubt of the jurisdiction of the surrogate, in whose office the will is proved, to cite the executors to account for the proceeds of the sale of real estate of the testator, made by them under a power of the will, either for the payment of debts or legacies, and to compel a distribution, as if the proceeds had been originally personal property, in the hands of an administrator. (*2 R. S. 109, § 57. Stagg v. Jackson, 1 Comst. 210. Clark v. Clark, 8 Paige, 153. Bloodgood v. Bruen, 1 Bradf. 8. Hall v. McLaughlin, id. 107.*)

The 75th section of the act of 1837, p. 537, authorizes the executor, who has made any sale in pursuance of any authority given by any last will and testament, to bring the proceeds into the office of the surrogate, before whom the will was proved, for distribution, and in that case it requires the surrogate to distribute the same, in like manner, and upon the like notice, as if such proceeds had been paid into his office, in pursuance of an order of sale of real estate for the payment of debts. But the executor is not absolutely *required* to do this, but may distribute the proceeds himself, in which case he may be called to account for the same, as has already been shown. The authority to pay it into court is for the benefit and protection of the executor, and not for the additional security of those interested in the fund. (*Holmes v. Cook, 2 Barb. Ch. R. 429.*)

It need scarcely be added, that the authority given to executors by a will, for the sale of real estate of the testator, must be strictly pursued. Where the testator has given no authority to sell real estate, the executors cannot sell any portion of it, either for the purpose of division or otherwise. (*Craig v. Craig, 3 Barb. Ch. R. 77.*)*

* The authority to sell the real estate of deceased persons for the payment of debts, was first given to the court of probate in the year 1786, by a single section of the statute. From that inconsiderable beginning, the system has swelled to its present monstrous proportions. It is, indeed, a cumbersome, dilatory, and expensive mode of making a man's real estate available for the payment of his debts.

It is some relief to know that no man is obliged, as a matter of course, to leave his affairs in such a way as to render a resort to this proceeding necessary. It is consolatory to reflect that every man can, by a judiciously constructed will, provide for the sale and disposition of his real estate, without a resort to the surrogate for authority. He may, if he pleases, make his real estate the primary, or the auxiliary fund, for the payment of both debts and legacies. But a large portion of men die intestate, and a still larger portion are reluctant to give their executors the same power over their real estate, as the law imparts to them over their personality. Hence, the present system will continue, perhaps, for years to come.

When, nearly a quarter of a century ago, the act of 1837, ch. 460, was in the hands of the then attorney general, (Bronson,) by whom, under the direction of a previous legislature, it was prepared, he sent a printed copy of it to the different surrogates then in office, with a request that they would furnish him with any suggestions which occurred to them, with respect either to the general subject, or to the statute as framed by him. The writer of this treatise was, at that time, surrogate of Washington county, and had devoted much time to the consideration of those branches of the law affecting that department. In answer to the communication of the attorney general, he suggested, as a substitute for the whole proceedings in the surrogate's court, for the sale, leasing, or mortgaging of real estate for the payment of debts, a change in the law relative to the administration of the estates of deceased persons, by virtue of which the testator's real estate should be assets in the hands of his executors or administrators, in the same manner as his personal chattels and choses in action. He thought there was no more danger in making this change, than there was a generation earlier in making a man's real estate liable to execution at the suit of his creditors, in his lifetime, and to the payment of his debts by simple contract or specialty in the hands of his heirs or devisees after his death. He thought there was no more danger in entrusting executors or administrators with the sale of a farm worth ten thousand dollars, than with the dominion over the same amount in value of bank stock, or other personal property. His suggestions failed to convince the attorney general, and the change recommended was not adopted. The glory, therefore, of the improvement, remains for some future reformer.

Few institutions of the middle ages made a stronger impression on the human mind than the feudal system. It is to that system we are indebted for our law of real estate. The distinctive character of the institution—the inalienability of the feud—impressed itself with unyielding tenacity upon the soil, and made the occupant the dependent vassal of his lord. Every clog that has been removed from the free circulation of real property, for the last 300 years, from the statute of wills and the abolition of knight service, to the subjecting land, in any form, to the payment of debts, has been a hard won triumph over ignorance and prejudice.

CHAPTER II.

OF PROCEEDINGS AGAINST EXECUTORS OR ADMINISTRATORS TO COMPEL THEM TO CAUSE AN APPLICATION TO BE MADE TO THE SURROGATE FOR AN ORDER TO LEASE, MORTGAGE OR SELL THE REAL ESTATE OF THE DECEASED, FOR THE PAYMENT OF HIS DEBTS.

In the last chapter we treated of the cases where the proceedings on the part of the executors or administrators were *voluntary* on their part. This embraces most of the cases that will arise, and all the cases which previous to 1830, could be discussed in surrogates' courts. If the executors or administrators neglected or refused to invoke the aid of the surrogate to reach the real estate of the deceased for the payment of debts, the remedy of the creditor, in case of a deficiency of personal assets, was against the heirs or devisees of the testator or intestate. This was a slow and expensive proceeding, and resulted in the exclusive benefit of the plaintiff who was the most vigilant in bringing his suit. It thus prevented an equal distribution of the estate. This was contrary to the policy of the law in other respects, and the revisers proposed, and the legislature adopted, the present plan as a substitute for actions brought by creditors against the heirs and devisees.

The system, as first adopted, limited the period within which the application could be made to three years from the date of the letters testamentary or of administration, and forbid any suit from being brought, during the same period, against the heirs or devisees of the realty, in order to charge them with the debts of the testator or intestate. (2 R. S. 108, § 48. *Id.* 109, § 53.) Nor could it be instituted until after the rendering a final account by the executors or administrators. This last provision is still in force, when the application is by a creditor. The limitation to three years is repealed. The 72d section of ch. 460, of the *Laws of 1837*, as amended in 1843, ch. 172, and 1847, ch. 298, is substituted for the original 48th section of the revised statutes. In substance it provides that if after the rendering of, and account-

ing by an executor or administrator to a surrogate as provided by the revised statutes, it shall appear that there are not sufficient assets to pay the debts of the deceased, the surrogate, *upon the application of any creditor*, made at any time after the granting of letters testamentary or of administration, shall grant an order for such executor or administrator to show cause why he should not be required to mortgage, lease or sell the real estate of the deceased, for the payment of his debts; but he shall not assign for cause why he should not be ordered to sell real estate, that the time within which he is allowed to sell the same has expired; and where a judgment has been recovered or decree obtained against an executor or administrator, for any debt due from the deceased, and there are not sufficient assets in the hands of such executor or administrator to satisfy the same, the debt for which the judgment or decree was obtained shall, notwithstanding the form of such judgment or decree, remain a debt against the estate of the deceased to the same extent as before, and to be established in the same manner as if no such judgment or decree had been obtained. Provided, that where such judgment or decree has been obtained upon a trial or hearing upon the merits, the same shall be *prima facie* evidence of such debt before the surrogate. (3 R. S. 196, 5th ed.)

If the executors or administrators have not rendered their account to the surrogate, the creditor intending to proceed under the foregoing section, must compel them to do so under the provisions with respect to accounting, which are treated of in another chapter. The rendering of an account by a part only of the executors or administrators is not enough. *All* must be compelled to account, before the creditor can proceed in this way. (*Sanford v. Granger*, 12 Barb. 392.) The costs of the judgment awarded against the executors can in no event be a charge on the real estate, in the hands of the heir. (*Id.*)

The order on the executors or administrators to show cause must be served on them personally, at least fourteen days before the day therein appointed for showing cause. (2 R. S. 108, § 49.) This order will be obtained on the presentation of a petition duly verified, setting forth the facts which entitle the creditor to the order. The form given for the original petition by the executors or admin-

istrators with suitable modifications, which will readily occur to an attentive person, will enable the creditor or his counsel to prepare the appropriate petition. If there be infants, similar proceedings to those heretofore described, must be had for the appointment of guardians ad litem.

On the return of the order requiring the executors or administrators to show cause, if no cause to the contrary be shown, the surrogate is required to order notice of the application to be served and published in the manner hereinbefore directed, on the application of an executor ; and if at the day appointed in such notice, the surrogate shall be satisfied of the matters specified in the *14th section of title 4, ch. 6, of part 2d* of the revised statutes, he may order such executor or administrator to mortgage, lease or sell so much of the real estate of which the testator or intestate died seised, as shall be sufficient for the payment of the debts established before him. (2 R. S. 108, § 50.)

If it appears on the return of the first order for the administrators or executors to show cause that all the personal estate has been applied to the payment of debts, and that there remain claims unpaid, for the satisfaction of which a sale of the real estate may be made, the surrogate is *bound* to issue the second order requiring all persons *interested* in the estate to show cause against the application. (*Richardson v. Judah*, 2 *Bradf.* 157.) In this respect the statute is peremptory. But with respect to the order requiring the executors or administrators to mortgage, lease or sell so much of the real estate whereof the testator or intestate died seised, as shall be sufficient for the payment of the debts established before him, it is otherwise. The language, instead of being imperative, leaves it *discretionary* with the surrogate to grant the order or withhold it. This discretion is not an *arbitrary*, but a *judicial* discretion, to be exercised according to the justice and equity of the case.

If there has been great and inexcusable delay on the part of the creditor, in instituting the proceedings ; if he has lain by and seen the real estate change owners ; if the demand sought to be enforced, would be barred by the statute of limitations, provided an action at law or in equity were brought to recover it in the supreme court ; or, if, indeed, it were a stale and unmeritorious

claim, the surrogate would, in either case, be warranted in withholding the relief invoked, at least, until the justice of it had been established by a decision of the court, in an action against such executors or administrators brought to recover the same. And even in the latter case, we have seen that such judgment, though obtained after a trial or hearing upon the merits, is only *prima facie* evidence of a debt before the surrogate; thus, leaving it with him to determine, at last, whether equity requires that the real estate of which the testator or intestate died seised should be sold to pay it. There may be other defenses to the claim of which enough has been said in the preceding chapter.

The creditor is not remediless if the surrogate declines to grant an order for the sale of the real estate. He may bring his action against the heirs or devisees, after the expiration of three years from the time of granting the letters testamentary or of administration. (2 R. S. 109, 452, 453.) The court would not stay the action, unless the surrogate should grant an order of sale, nor then unless the plaintiff should allege that lands have descended to the heirs or been devised to the devisees, which were not included in any order of sale, in which case a decree in such suit would not change or in any way affect any land so ordered to be sold. (*Id.* 109, § 53.)

Should the surrogate decide to grant the order of sale, his judgment cannot be reviewed by the executors or administrators, nor can they defeat the proceedings by refusing or neglecting to serve and publish the notices required, or to do any other act necessary to authorize the order. In such a case the surrogate is empowered to appoint a disinterested freeholder to perform the duties enjoined upon the executors or administrators, who is required to proceed therein in the same manner as the former were directed to do. (2 R. S. 109 § 53.)

The subsequent proceedings in case a sale is ordered, will be similar to those already discussed in the preceding chapter.

CHAPTER III.

OF LEGACIES; THEIR DIFFERENT KINDS AND INCIDENTS, AND
THE CONSTRUCTION THEREOF.

SECTION I.

Of the different kinds of legacies.

Legacies with respect to their subject matter are of two descriptions, either *general* or *specific*. The former appellation is expressive of such as are pecuniary, or merely of quantity. Under the denomination of specific legacies, two kinds of testamentary gifts are included; as first, where a certain chattel is particularly described, and distinguished from all others of the same species, as "I give the diamond ring presented to me by A." This legacy can be satisfied only by the delivery of the indentical ring; and if it be found not among the testator's effects, it fails altogether, unless it be in pawn, when the executor, it is said, must redeem it for the legatee. The second kind of specific legacy is where a chattel of a certain species is bequeathed without any designation of it as an individual chattel, as "I give a diamond ring." A bequest of this description can be fulfilled by the delivery of anything of the same kind. (2 *Mad. Ch. Pr.* 7, 8. *Toller*, 301.)

It is a general rule that no legacy is to be held specific unless clearly so intended; and this gives rise to another class, having the appearance in some respects of specific legacies, and partaking of the nature, to a certain extent, of a general legacy. They are styled *demonstrative* legacies; as where a sum of money is given out of a particular fund. In such a case the legacy does not follow the fate of the particular fund; and thus far it differs from a specific legacy; but it is considered specific as to the legatee, and therefore does not at common law abate on failure of assets. (*Coleman v. Coleman*, 2 *Ves. jr.* 160.)

Legacies may again be divided with respect to their enjoyment,

into *vested* and *contingent*; *absolute* or *conditional* legacies. They may also be viewed as subject to other incidents, such as being *cumulative*, in distinction from a *repetition* of the same legacy. Specific legacies are subject to *ademption*, by the destruction of the subject matter in the lifetime of the testator. All legacies are liable to *lapse* on certain contingencies, except where the statute has intervened to prevent it. They are subject also to the equity doctrine of *election* and satisfaction. General legacies are sometimes charged upon the real estate of the testator, either as the primary or auxiliary fund for their payment.

The jurisdiction of the surrogate's court over legacies is mainly, if not exclusively, derived from the statutes. It does not extend to the enforcement of legacies charged on the real estate of the testator, and is, in other respects, less comprehensive than that of courts of equity, now possessed by the supreme court. The limits of this treatise will not permit a full discussion of the whole doctrine of legacies. We can only give a brief and general view of the subject.

1. Of *general* and *specific* legacies. A legacy is *general*, when it is so given as not to amount to a bequest of a particular thing or money of the testator, distinguished from all others of the same kind. It is *specific* when it is a bequest of a specified part of the testator's personal estate. (*Tift v. Porter*, 4 *Seld.* 518.) Accordingly, where the testator owned 360 shares of Cayuga county bank stock, and he bequeathed 240 shares of Cayuga county bank stock to one legatee, and 120 shares to another, but without indicating that the shares bequeathed were to be taken from those which he owned at the time of his death, the court of appeals held that the legacies were general. (*Id.*)

The presumption, both of law and equity, is in favor of general legacies. To establish a specific legacy, it requires a clear manifestation of the testator's intention. The court leans against considering legacies specific because of the consequences. (*Ellis v. Walker*, *Ambler*, 310. *Walton v. Walton*, 7 *J. Ch. R.* 264. *Tift v. Porter*, *supra*. *Enders v. Enders*, 2 *Barb. S. C. R.* 367.) This inclination, says Lord Eldon, has been indulged to such an extent, in order to prevent legacies from being disappointed in substance, and they have been so anxious to procure the

legatees the bounty in some cases, that they have construed words giving the specific *corpus*, as a direction to purchase that *thing*. (*Sibley v. Perry*, 7 Ves. 530.)

There is a strongly marked distinction between *general* and *specific* legacies, in many respects. If the legacy be *specific*, and the testator does not leave among his effects the thing bequeathed, the legacy fails altogether; and the executor cannot be required to make it good. But if the legacy be *general*, and the thing given is not found in the possession of the testator, at his death, and the assets are sufficient to pay debts and legacies, it is the duty of the executor to purchase an article corresponding with the description of the legacy.

In *Evans v. Tripp*, 6 Mad. 91, the testator gave a sum in stock *standing in his name*. The testator had no stock, either at the time he made the will or at his death. The vice chancellor (Leach) held that nothing passed by the will. And he said, "A gift of my *grey* horse will pass a *black* horse, which is not strictly *grey*, if it be found to have been the testator's intention that it should pass by that description; but if the testator has no horse, the executor is not to buy a *grey* horse."

A bequest of a sum of money generally, or of a sum in government securities, must be taken as a legacy of quantity, and is, therefore, a general legacy. This doctrine, it is said, prevails, notwithstanding the testator may have a greater, or the exact quantity of the specific stock, at the date of his will. (*Bronsdon v. Winter*, *Ambler* 59.) In *Purse v. Snaplin*, 1 Atk. 413, the testator bequeathed £5000 south sea stock to A. & B. each. At the time of making his will, the testator had only £5000 south sea stock. It was held that the legacy was general; and the executor was consequently decreed to transfer the £5000 stock in moieties to A. & B., and to purchase £5000 more of the same stock to be divided in the same manner. But stock, or government securities, may be specifically bequeathed, when there is a clear reference to the *corpus* of the fund. Thus, the word "my" preceding the word stock, or annuities, has been several times adjudged sufficient to render the legacy specific; as where the bequest is of "my" capital stock of £1000 in the India company stock, or a legacy is given of "my" stock, or in "my" stock, or

part of "my" stock. (*Sibley v. Perry*, 7 Ves. 530. *Barton v. Cooke*, 5 id. 461. *Kirby v. Potter*, 4 Ves. 750.) On this principle, Chancellor Kent held that a bequest in these words, "I give and bequeath to my nephew all my right, interest, and property in thirty shares which I own in the bank of the United States of America," was a specific legacy. (*Walton v. Walton*, 7 J. Ch. R. 258.) So also a bequest of "the proceeds of a bond and mortgage I hold against S." was held by the supreme court to be specific. (2 Barb. S. C. R. 83.)

Ademption is an incident of a specific legacy. If a debt specifically bequeathed be received by the testator, the legacy is adeemed. (*Preston on Legacies*, 325.) This rule of ademption does not apply to demonstrative legacies. With regard to them, the legacy remains, although the fund for its payment has been called in, or altered by the testator in his life time. Nor does it apply to *general* pecuniary legacies; as where the testator bequeaths a horse, a yoke of oxen, or other article, not describing it by any mark so as to distinguish it from all others of the like nature. In such a case, if the testator does not possess the thing bequeathed, and leaves sufficient assets, the executor must purchase an article answering the description of the will, or otherwise pay its value to the legatee.

A distinction was formerly made between a *voluntary* and *compulsory* payment. A voluntary payment of a debt specifically bequeathed, was considered not any ademption, since the payment did not create any alteration of the testator's intention; nor did a compulsory payment of itself create an ademption, as it might be done for the benefit of the legatee. (*Preston on Legacies*, 326.) But modern decisions have repudiated this distinction; and it may now be considered as established, in the words of Lord Thurlow, in *Humphreys v. Humphreys*, (2 Cox, 185,) that "the only rule to be adhered to is, to see whether the subject of the specific bequest remained in *specie*, at the time of the testator's death, for if it did not, then there must be an end of the bequest; and the idea of discussing what were the particular motives and intentions of the testator, in each case, in destroying the subject of the bequest, would be productive of endless uncertainty and con-

fusion." These remarks relate to a case where the testator, *by his own act*, destroys the subject of the gift. But where the fund is varied or differently arranged, *by operation of law*, but its identity not lost, the legacy will not be adeemed. Thus, in *Walton v. Walton, supra*, where the shares of stock in the old United States bank were specifically bequeathed, the legacy was held not to be adeemed by the expiration of the charter of the bank, and the conveying of the fund to trustees for distribution to the parties entitled to it.

In *Gardner v. Printup, supra*, the testator bequeathed specifically the *proceeds* of a bond and mortgage, particularly described. Previous to the death of the testator, he commenced proceedings to foreclose the mortgage, which resulted in the sale by the mortgagor of the premises to other parties, who paid a portion of the amount of the purchase money to the testator, which was endorsed on the original mortgage, and gave a new mortgage to the testator on the same premises for the balance, as collateral to the original mortgage, which was still held by the testator. It was held that this operated only as an ademption *pro tanto* of so much of the legacy as was received by the testator in money, but that the new mortgage, or the amount due thereon, at the death of the testator, passed to the legatee as part of the specific legacy.

To constitute an ademption of a specific legacy, the disposition of the subject must be absolute. If, therefore, the testator pawns or pledges an article specifically bequeathed, and dies before the right of redemption has expired, the legatee has a right to require the executor to redeem the thing bequeathed, and deliver it to him. (*Per Ld. Thurlow*, 2 Bro. C. C. 113.)

A bequest to S. of the amount of his bond and mortgage to the testator, is a forgiveness of the debt, or specific legacy, and not a pecuniary legacy. (*Sholl v. Sholl*, 5 Barb. 312.)

A *demonstrative* legacy is a general or pecuniary legacy, where a particular fund is pointed out by the will for the payment of it. If the fund fails, such a legacy is to be made good out of the general assets. The fund is designated only as the convenient means by which to discharge it, and becomes descriptive of the amount

or value of the gift. (*Walton v. Walton*, 7 *John. Ch. R.* 262. *Enders v. Enders*, 2 *Barb. S. C. R.* 367.)

Legacies are either *vested* or *contingent*. And here a distinction is made between legacies payable out of real or personal estate, or out of both funds.

Legacies are primarily payable out of the personal estate, though the real estate be charged; and, therefore, it is proper *first* to consider such as are payable out of the personalty. These legacies are *vested*, by the assent of the executor, immediately on the testator's death, if given generally; as "I bequeath to A one hundred dollars." A legacy is said to be *contingent* where the enjoyment of it depends on the happening of some event. If the legacy is vested in the legatee, and the legatee dies, the interest in the legacy passes to his personal representatives. But there is much learning in the books on the subject of the *lapse*, or failing of a legacy, by means of the death of the legatee *before* the testator; or by means of the death of the legatee *after* the death of the testator, but before the happening of the contingency on which the legacy is to vest. And there is also a distinction in this respect, between legacies charged on land and such as are payable out of the personalty, or out of a mixed fund of real and personal estate.

It is proposed, briefly, to notice these distinctions.

The first class of cases we will consider, is where the legacy *lapses* by the death of the legatee, *before* the death of the testator.

There is no principle better established, from the earliest period, both in the ecclesiastical courts and in the courts of equity, than this, to wit, that, at common law, unless the legatee survives the testator, the legacy is extinguished; neither can the executors or administrators of the legatee demand the same. (*Wentworth's Ex'rs*, 436. 2 *Phill.* 261.) This rule was modified by the revised statutes in 1830. It is enacted that whenever any estate, real or personal, shall be devised or bequeathed to a child, or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant, who shall survive such testator, such devise or legacy

shall not lapse, but the property so devised or bequeathed shall vest in the surviving child, or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator, and had died intestate. (2 *R. S.* 66, § 52. *Bishop v. Bishop*, 4 *Hill*, 138. *Chrystie v. Phyfe*, 22 *Barb*, 195. *Armstrong v. Moran*, 1 *Bradf.* 314.) The statute prevents a lapse only in cases where the testator is the ancestor of the legatee or devisee, and where the deceased legatee or devisee leaves a child or other descendant, in esse, at the death of the testator, in whom the property devised or bequeathed can vest. If the legatee or devisee is not a lineal descendant of the testator, or if the testator has no lineal descendants of his own, the devise or legacy is subject to all the rules, with respect to lapse, which have been established on this subject.

The consequences of a lapse may always be prevented by the testator by a suitable provision in his will. If he directs, in his will, that in case the legatee or devisee should die before the vesting of the legacy or devise, the property so bequeathed or devised should not lapse, but should go to some other person therein named, his intention could be carried into effect. (*Perkins v. Michlethwaite*, 1 *P. Wm.* 274. *Sibley v. Cook*, 3 *Atk.* 572.) This intention of the testator cannot be proved by evidence dehors the will, but must be gathered from an examination of the whole instrument. Thus, it appears, that to prevent a lapse by the death of the legatee, in the lifetime of the testator, two circumstances must concur, to wit, first, the manifestation of an intention to that effect on the face of the instrument, and second, the substitution of a person capable of taking instead of the deceased legatee. (See form of clause in a will to prevent lapse, Appendix, No. 1.)

If a legacy be given to two persons *jointly*, and one of them die before the testator, such interest will not lapse, but will survive to the other legatee. (*Gardner v. Printup*, 2 *Barb. S. C. R.* 83, 89.)

But where legacies are given to several legatees by name, as tenants in common, *to be divided among them in equal parts*, if any one should die before the testator, his share will not go to the survivors, but will lapse. (*Bagwell v. Dry*, 1 *P. Wm.* 700. 2 *id.* 488.) It is otherwise where a legacy is given to several in-

dividuals, not by name, but in a class; as where a legacy is given to the children of A. The death of any of them will not occasion a lapse of his share, but it will go to increase the fund, and, those of the described class will take the whole. (2 *Bro. C. C.* 658.)

It is an established rule, that if a legacy be given to A for life, remainder over to B, and A dies before the testator, the remainder will take effect on the testator's death. (*Hardwick v. Thurston*, 4 *Russ.* 380.)

The second class of cases under this head, is where the legacy lapses by the death of the legatee after the death of the testator.

The general rule of construction, at common law, is that where a legacy is given, without specifying any time of payment, it is due on the death of the testator, though not payable until one year afterwards. This delay of a year was for the convenience of the executor, affording him time to ascertain the extent of the claims against the estate, and the condition of the assets, and was never considered as preventing the legacy from vesting. (2 *Salk.* 415.) The common law rule of giving the executor a year from the death of the testator for this purpose, is expressly enacted by the revised statutes, with this difference, however, that by the statute the executor or administrator is prohibited from paying any legacy until after the expiration of one year from the *date of his letters testamentary or of administration*, unless the same are directed by the will to be sooner paid. (2 *R. S.* 90, §§ 43 to 45.) There is nothing in the postponing of the payment of a legacy to a future day, incompatible with its immediately vesting in the legatee on the death of the testator. (*Collins v. Macpherson*, 2 *Simons*, 87.) The death, therefore, of the legatee within the year, occasions no lapse of the legacy, and the interest of the legatee is transmitted to his personal representatives.

But where the future time of payment is defined in the will, the legacy will be vested or contingent, according as upon an examination of the whole instrument, it appears whether the testator meant to annex the time to the *payment* of the legacy, or to the *bequest* of it. It resolves itself, therefore, into a question of intention; to ascertain which, the courts of equity, following the practice of the ecclesiastical courts, in this respect, have estab-

lished two positive rules of construction, 1st. That a bequest to a person, *payable* or *to be paid*, at any certain determinate term, as when the legatee shall arrive at the age of twenty-one years, or be married or the like, confers on him a vested interest, immediately on the testator's death; it being considered as *debitum in presenti, solvendum in futuro*, and, therefore, transmissible to his executors or administrators. (2 *Fonb. Eq.*, b. IV, part 1, ch. 1, § 3. *Toller*, 305, 171, 172.) 2d. That if the words *payable* or *to be paid* are omitted, and the legacy is given, *at* twenty-one, or *when*, or *if* the legatee shall attain the age of twenty-one, or if he shall survive B., or the like, these expressions annex the time to the substance of the legacy, and make the legatee's right to depend on the happening of the event contemplated. In short, they constitute it a contingent legacy. The attaining *twenty-one*, or *surviving B.*, is a condition precedent, the performance of which is necessary to vest the legacy. And consequently if the legatee happens to die before that period, his personal representatives will not be entitled to the legacy. (*Preston on Legacies*, 104. 2 *P. Wms.* 610 to 612. *Patterson v. Ellis*, 11 *Wend.* 259, 671.) The doctrine with its qualifications and the cases by which it is supported will be found stated in the cases above cited.

The rule, however, is subject to exceptions, arising from the intention of the testator. Thus, where the testator gives a legacy to a person *at* a future period, or *when*, or *if*, he shall arrive at the age of twenty-one years, or directs it to be applied for his benefit, the courts have considered this disposition of the interest, as an indication of the testator's intention, that the legatee shall at all events, have the legacy, and, therefore, have held the legacy under such circumstances to be vested. (*Fonereau v. Fonereau*, 3 *Atk.* 645.)

We will now notice the doctrine of the lapsing of legacies payable out of the real estate of the testator.

The principle applicable to a bequest out of the *personal* estate, viz. that a legacy to a person payable at a future time, contains a present vested interest, as *debitum in presenti, solvendum in futuro*, does not hold, generally speaking, in regard to legacies payable out of the real estate.

The reason for this diversity is stated in the books to be, that the rule in relation to legacies, out of the personal estate, was borrowed from the civil law, in which a bequest to be paid at a future time, was held to confer a present right to the legacy. And anciently the ecclesiastical courts had the exclusive jurisdiction of legatory matters arising on personal estates, and their decisions were regulated by the civil law. When the courts of equity acquired cognizance of this class of legacies, they adopted, with a view to a uniformity of decision, the rule in question with regard to legacies. But legacies payable out of land were never within the cognizance of the ecclesiastical courts; there was not, therefore, the same reason for adopting the rule of the civil law; and as the heir is the special favorite of the courts in England, they established a course of decisions more favorable to the inheritance.

This rule, however, is qualified by an exception as firmly fixed as the rule itself. The rule, as it now exists, both here and in England, in respect to the vesting of legacies payable out of real estate, is thus correctly stated by V. Chancellor McCoun, in *Marsh v. Wheeler*, (2 *Ed. Ch. Rep.* 163,) and approved by Chancellor Walworth in *Harris v. Fly*, (7 *Paige*, 429,) "Where the gift is immediate, but the payment is postponed, for instance, until the legatee attains the age of twenty-one years, or marries, then it is contingent, and will fail if the legatee dies before the time of payment arrives; but where the payment is postponed in regard to the convenience of the person, and the circumstances of the estate charged with the legacy, and not on account of the age, circumstances, or condition of the legatee, in such a case it will be vested, and must be paid, although the legatee should die before the day of payment." The same doctrine is sustained by the court of appeals, in *Sweet v. Chase*, 2 *Comstock*, 72. *Birdsall v. Hewlett*, 1 *Paige*, 32, *S. P.*

As the rule and its exception are founded on the supposed intention of the testator, it will be controlled by a direction in the will, that the legacy should vest at the death of the testator. (*Watkins v. Check*, 2 *Sim. & Stu.* 199.)

It sometimes happens that legacies are charged on a *mixed fund of realty and personally*. In such a case, the personalty,

unless there are special directions in the will to the contrary, is the primary fund. So far as that fund extends to pay, the case is governed by the same rules that are applicable to legacies payable out of the personal estate alone; it is not until the real estate has to be resorted to, that the case is governed by the principles applicable to a legacy charged on the land. (*Duke of Chandos v. Talbot*, 2 P. Wms. 613, and note. *Dodge v. Manning*, 11 Paige, 334. *Hoes v. Van Hoesen*, 1 Comstock, 120.)

A legacy, therefore, of this kind is of a mixed character. It may sometimes happen that, with reference to one fund, the legacy may be vested, and, as to another, *lapsed*.

Legacies, we have said, are *absolute* or *conditional*.

An absolute legacy is where a thing of a personal nature is bequeathed without any qualification; as, "I give and bequeath to A. one hundred dollars."

A conditional legacy is defined to be a bequest whose existence depends upon the happening or not happening of some uncertain event, by which it is either to take place, or be defeated. (1 *Roper on Legacies*, 645.)

Conditions are of two kinds: conditions *precedent*, and conditions *subsequent*.

A *condition precedent* is where some given event must happen, or time arrive, before the vesting of the legacy. One kind of conditions precedent has already been considered under the head of contingent legacies; as, where a legacy is given to A. *if* he shall attain the age of twenty-one years.

The word "provided" is an appropriate term for creating a condition precedent. (*Robertson v. Caw*, 3 Barb. S. C. R. 411. *S. C. on appeal*, 1 Seld. 125, concurring with S. C. on this point.) Thus, in that case, the will gave "to the associate reformed church of Broadalbin five hundred dollars, *provided* the Rev. David Caw continues to be their pastor for seven years to come, but if not, then it must be paid over to said David Caw with interest." It was held by the court of appeals that the condition annexed to the bequest was valid; and (the pastoral relations between said Caw and said church having been dissolved by mutual consent,

within the seven years,) that no interest whatever vested in the church, but that said Caw was entitled to the legacy.

A *condition subsequent* is where a legacy already vested, may be defeated by the happening or not happening of some future event, as where a legacy is given A to be paid at the age of twenty-one, and, if he dies before that period, then to B. The legacy to A. is vested, though payable at a future time, and the limitation over to B is on condition subsequent; to wit, the death of A before he arrives at the age of twenty-one. (*Nicholls v. Osborn*, 2 P. Wms. 419.)

No precise form of words is necessary in order to create a condition in a will. Lord Talbot very truly said, "There are no technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either, according to the intent of the party who creates them." (*Cases temp. Talbot*, 196.)

Conditions are void when they are repugnant to the bequest, illegal, or against public policy. *Bac. Abridg. title Condition, K. and L.*) In such a case, the legacy is under certain circumstances good, the condition being a nullity or disregarded; and, under other circumstances, both the legacy and condition are void.

Conditions are said to be *in terrorum* only, *where there is no bequest over*, on breach of the condition; as if the testator bequeaths to A one hundred dollars, and directs that if he disputes the will, or the validity of it, the legacy shall fail. The legacy in this case vests in A on the death of the testator; but, as there is no subsequent disposition of it, on failure of the condition, it is presumed the testator intended the legatee should have it, at all events. But if the will contains a *particular* bequest over of the legacy to some other person, on the failure of A to perform the condition, the limitation over is good, and will take effect, on A's failure to perform. (*Cleaver v. Spurling*, 2 P. Wms. 528.)

If a condition precedent annexed to a bequest is against good morals; as a legacy to a daughter, *if she lived apart from her husband*, the condition is void, and the legacy simple and pure. (*Cooper v. Remsen*, 5 J. Ch. R. 462.) This principle is borrowed from the civil law. But if the condition be to do an act, *malum in se*, as if a legacy be given to A, provided he kills B,

burns a house, or the like, both the legacy and condition are void, as well by the civil as the common law. (*Swin. pt. 4, § 6, pl. 16.*)

But a legacy by a father to his daughter, who, at the date of the will, was living separate from her husband, in consequence of domestic difficulties, expressed to be *during her separation* from her said husband, is a charitable and humane provision. To entitle the legatee, however, to this bequest, she must show that the separation was not voluntary on her part, or occasioned by a renunciation of her conjugal duties, and that the separation subsisted at the death of the testator. A separation arising from the fault of the legatee, or by the death of her husband, does not satisfy the meaning of the testator. (*Cooper v. Remsen, 3 J. Ch. R. 382. S. C. 5 id. 459.*)

Under this head of conditional legacies may be classed *legacies to executors*.

It is a presumption that a legacy to a person appointed executor is given to him in that character, and it is for him to show something, in the nature of the legacy, or other circumstances arising in the will, to repel that presumption. (*Dix v. Reed, 1 Sim. & Stu. 237.*) A legacy of this nature is a conditional legacy, and the right of the legatee to receive it depends on his assumption of the office.

It is not necessary, in order to create the legacy a conditional one, that it should be expressed to be for care or pains, or not. It is enough, according to Lord Alvanly in *Harrison v. Rowley, 4 Ves. 216*, that it is given to him *as executor*.

But if there is no *express* condition stated, and the motive for the legacy is set forth in the will, that it is bequeathed as a mark of regard, or by reason of relationship of the legatee to the testator, the legacy is pure and not conditional. (*Dix v. Reed, supra.*) No doubt, a testator may make a bequest to an executor in such terms, that the legacy will vest, though the legatee renounces the office of executor. In such cases the language of the will should be unequivocal. In *Dix v. Reed, supra*, the testator bequeathed to two of his executors by name, a legacy upon the express condition of accepting the trust. After bequeathing various other legacies he proceeds thus, "I give unto my cousin, T. K. the sum of £50, whom I appoint as joint executor in trust

in this my will." T. K. did not accept the trust but renounced, and the other executors proved the will. The question was whether T. K. was entitled to his legacy, and it was held that he was. The expressing a condition in the one case, and omitting it in the other, afforded a presumption that the different legacies proceeded from different motives. Besides, describing T. K. as his cousin, afforded some evidence that the relationship was the inducement for the legacy.

So where several executors were appointed, and among others the testator's "friend and partner," to whom he gave legacies to a large amount, so that he was entitled under the will to much greater benefits than any of the other executors; this circumstance was held sufficient to rebut the presumption that the legacy was given in contemplation of the character of executor alone. Gifts to persons simply in their characters of executors, would naturally be *equal*, says the vice chancellor, because the trouble is equal to all. (*Cockerell v. Barber*, 2 Russ. Ch. R. 585.)

With regard to what will be a sufficient manifestation of an intention to accept the office of executor, so as to entitle the personal representatives of the legatee to the legacy, in case the legatee should die before payment, proving the will, with the *bona fide* intention to execute it, is sufficient to vest the legacy, though the executor die before any thing further be done. If the executor renounces the office altogether, or proves the will only, to entitle himself to the legacy, and then gives up the trust, he does not perform the condition, and is not entitled to the legacy.

In *Harrison v. Rowley*, 4 Ves. 212, the executor died before probate; but he had concurred with the other executors in giving directions for the funeral, and in paying certain sums for burial fees, for making the coffin and opening the vault, and there was no unreasonable delay in proving the will. It was held that the legacy vested, and that the personal representatives of the deceased executor were entitled thereto.

In general it is the duty of an executor to whom a legacy is given for care and pains to act promptly, and while any unnecessary delay of the legatee in accepting the trust, may be laid hold of by the court to deprive him wholly of the legacy, yet it seems

if the legatee finally accepts, he may be allowed such portion of the legacy as his services bear to the whole duty imposed upon him by the will, as the inducement for giving the legacy. (*Morris v. Kent*, 2 *Edw. V. Ch. R.* 174.)

Sometimes a question arises under a will, whether in case there be two legacies of the same thing or amount, to the same individual, the latter shall be treated as *cumulative*, or only a *repetition* of the first legacy. Where the legacies are cumulative the legatee takes both; but if the latter is a mere repetition of the first, being the same thing given twice, the legatee takes but one. The latter is usually, in such a case, a substitution for the former. The whole doctrine on this subject was well reviewed, and the cases collected by the supreme court in *De Witt v. Yates*, 10 *John. R.* 156.

In deciding the question whether a legacy is cumulative, or is merely a repetition, the intention of the testator is the rule of construction. This intention must be ascertained according to the rules of law, and the cases in which the question arises are usually classed by the writers as follows:

1st. Where there is no evidence of intention, either internal or extrinsic, one way or the other. 2d. Where there is internal evidence; and 3d. where there is extrinsic evidence.

1st. Under the first head, to wit, where there is no evidence of intention, internal or extrinsic, there are four positions laid down by the elementary writers and supported by adjudged cases. They are as follows:

1. Where the same *specific* thing is bequeathed *twice* to the same legatee, either in the same will, or in the will and again in a codicil, in that case, he can claim the benefit only of one legacy, because it could be given no more than once. (*Toller*, 335. *De Witt v. Yates*, *supra*.)
2. Where the like *quantity* is bequeathed to him twice, by *one and the same instrument*, the legatee is entitled to one legacy only. (1 *P. Wms.* 424, note 1.)
3. Where the bequest is of *unequal quantities in the same instrument*, the one is not merged in the other, and the legatee is entitled to both, the one being cumulative to, or in addition to the other.
4. And lastly, where the bequest is of equal or unequal quantities,

bequeathed in *different instruments*, the legatee shall take both, the legacies being cumulative. (*Masters v. Masters*, 1 P. Wms. 424.)

2. Under the second head, to wit, where there is internal evidence, it may be observed that the second legacy may be so expressed, or the other circumstances may be such, as to remove all doubt on the subject. Thus, where a later codicil appears to be merely a copy of a former, with the addition of a single legacy, or where both legacies are given *for the same cause*, they are not cumulative. The intention of the testator, whether he meant a duplication of the legacy, may be inferred from slight circumstances. (*Masters v. Masters*, *supra*.)

3. Under the third head, to wit, where there is *extrinsic* evidence, it may be remarked that, although parol evidence is inadmissible against the expressed effect of a written instrument, it is, nevertheless, proper to show the circumstances and situation of the testator at different periods. (*Hurst v. Beach*, 5 Mad. Rep. 351.) Hence, if a testator, after making his will, and before the execution of a codicil, has received an additional estate, it may be proved as affording evidence that he intended, by a legacy in the codicil, an additional bounty to the legatee. (*Masters v. Masters*, *supra*.)

It sometimes happens that a devise or legacy is given to a widow in lieu of dower, and this gives occasion to examine the doctrine of *election*, so far as it relates to testamentary matters.

Every devise or bequest in a will imports a bounty, and, therefore cannot, in general, be averred to be given in satisfaction for that to which the devisee or legatee is by law entitled. Upon this principle, a devise cannot be averred to be in satisfaction of dower, unless it be so expressed in the will. (*Van Orden v. Van Orden*, 10 John. 30. 1 Cruise Dig. 180, ch. 4, tit. Dower. *Lasher v. Lasher*, 13 Barb. 106.)

The doctrine of election in this state most frequently arises out of devises and legacies, in which one party claims that such devise or legacy is in lieu of dower, and the other insists on retaining both. If the legacy or devise be in *express terms*, in lieu of dower, the widow is doubtless put to her election, for she can-

not take both. The revised statutes have made full provision on this subject in affirmance of the common law. (1 *R. S.* 741.) The full consideration of this branch of the subject belongs to treatises on dower.

It is in cases where the legacy or devise is not in *express terms* declared to be in lieu of dower, that there is any room for argument or doubt. As the right to dower is a legal right, the wife cannot be deprived of it by a testamentary provision in her favor, so as to put her to an election, unless the testator has manifested his intention to deprive her of dower, either by express words or necessary implication. (*Willard's Eq. Juris.* 547. *Fuller v. Yates*, 8 *Paige*, 328. *Adsit v. Adsit*, 2 *John Ch. R.* 451. *Havley v. James*, 5 *Paige*, 318. *Wood v. Wood*, *id.* 596. *Sandford v. Jackson*, 10 *id.* 266.) The cases go so far as to show that the claim of dower must be inconsistent with the will, or repugnant to its dispositions, or some of them, before we can deduce an implied intention to bar dower. In short, the claim cannot be resisted by implication, unless the allowance of it would disturb or disappoint the will. (*See same cases.*)

The principles applicable to barring dower by the acceptance of a testamentary provision in lieu of it, may be extended to barring the widow's claim to exempt property in the like manner. It has been seen already, that there are certain articles exempt by law in favor of the widow and minor children. These cannot be bequeathed away by the testator, or taken to satisfy the claims of creditors. They are sacredly devoted to the humane purpose of alleviating the calamities of widowhood and orphanage. Suppose the testator bequeaths one cow to his wife, without expressing it to be in lieu of the one belonging to her by law, as the widow, and the testator dies possessed of several cows, the question is often asked, is the widow, in such a case, entitled to the cow bequeathed to her, and also the one exempted in her favor by law? In my judgment, she is entitled to both. The one she receives as a bounty from her husband, and the other by force of the law. It stands on the same footing as her claim to dower, and may be barred in the same way. In each case, the statutory provision in favor of the widow is beyond the reach of the testator, through the means

of his will, against her consent; and in each her right is paramount to that of creditors, or the kindred of the husband.

The testator may, however, annex a condition to the bequest, that it shall be in lieu of the articles exempt by law; in which case she would be put to her election between the exempt articles and the bequest. If the testator left but one cow, and bequeathed one cow to his wife in general terms, she would be entitled to the one he left, under the statute; and whether she would be entitled to call on the executors to purchase another to answer the bequest, would depend on other parts of the will and the state of the assets. If the cow was so described in the will as to indicate that the particular cow he owned at his death, was the one intended by the will, the executors would not be required to purchase another, but the widow would take the only cow, under the statute. It would be analogous to a will merely directing that his wife should have what the law gives her, in which case she takes nothing under the will.

SECTION II.

Of the effect of legacies on the relation of debtor and creditor.

1. *Of legacies to a creditor in satisfaction of a debt due by the testator to the legatee.* It was said by the supreme court, in *Williams v. Crary*, (5 Cowen, 370,) that although it is a general rule that a legacy given by a debtor to his creditor, which is equal to or greater than the debt, shall be considered as a satisfaction of it; yet, where there are any circumstances in the case to repel the presumption that such was the intention of the testator, courts have always seized upon them to prevent the application of the rule. It has never been applied to the case of a debt existing in an open and unliquidated account; because the testator, in such a case, is not supposed to know how the balance stands, and whether the legatee is a creditor or not. (*See the same case*, 8 Cowen, 246, and 4 Wend. 443.)

The subject was very fully examined by the chief justice, in 4 Wendell, *supra*, and the exceptions to the rule stated. An attentive examination of that case, and those cited in the discussion, enable us to state the following circumstances as sufficient

to rebut the presumption that the legacy was intended as a payment of a debt, and showing that it was intended as a bounty.

1. A legacy is never deemed a satisfaction of debts contracted *after* the date of the will. 2. It is not considered as a payment when the will contains an express direction that the debts and legacies shall be paid, as "after all my debts and legacies are paid then I give," or words of like import. 3. Nor is a satisfaction of a preexisting debt occasioned by a legacy bequeathed for a different purpose, as where the particular purpose or motive for the gift is stated, and the debt not mentioned; as where the testator bequeaths a sum of money, or other thing, to the legatee as a token of regard, or from ancient friendship, or from relationship and the like. 4. Where the legacy is contingent and uncertain, or payable at a future time, or upon condition, it is not a satisfaction, and the legatee is entitled both to the debt and legacy. 5. If the legacy is less than the debt, or the debt is unliquidated, or in negotiable paper, or in a current account, the legacy does not impair the debt. 6. Where the legacy is of a different nature from the debt, as where the testator is indebted by bond and bequeaths an interest in land. 7. A specific legacy, however valuable the bequest is never a satisfaction unless so expressly declared in the will, and so accepted by the legatee.

In all cases where the legacy does not operate as a payment or satisfaction of the debt, the legatee is entitled both to the debt and legacy. And where the property is sufficient to satisfy all, the testator may be both just and generous. But where there is a deficiency of assets there is a stronger reason for holding the legacy a satisfaction, and accordingly it is laid down by respectable authority, that it shall in all such cases be deemed a satisfaction. (*Toller*, 337.)

A bequest of a debt to a debtor is no more than a release by will. It will not take effect in case there is a deficiency of assets for the payment of debts; because the debt itself is assets in the hands of the executor, and the legacy cannot operate without his assent. (*Rider v. Wager*, 2 P. Wms. 331, 332.)

2. *Of legacies by a creditor to his debtor.* At common law the appointing of a debtor executor operated as a release or extin-

guishment of the debt. (*Wentworth's Ex'rs*, 73.) The principle was that a debt is merely a right to recover the amount by way of action, and as an executor could not maintain an action against himself, his appointment to that effect by his creditor, suspended the action for the debt. And where a personal action was once suspended by the voluntary action of the party entitled to it, it was forever gone. (*Id. and Co. Litt.* 264, b.)

The rule was the same where a creditor appointed one of several debtors, executor; for they could not sue without making him who is the debtor plaintiff, which could not be against himself. (*Wentworth's Ex'rs*, 74, 75.) This principle, that making the debtor executor discharged the debt, was held to apply only in cases where there was a sufficiency of assets to pay all the debts, without resorting to the debt thus released. But where there was such deficiency at common law, a court of equity held the debtor executor liable to pay. (*Freakley v. Fox*, 9 B. & C. 134, per Lord Tenterden, C. J.) And, indeed, the presumption of a discharge was allowed to be repelled by express terms, or by implication from the contents of the will, as by a specific legacy to the executor, or of part of the debt to another, or of the residue among several executors; or if the executor be a mere trustee of the whole estate, or the debt arises in respect of the real estate in favor of the heir. (*Wentworth's Ex'rs*, 74, note and cases. *Stagg v. Beekman*, 2 Edw. V. Ch. R. 89. *Berry v. Usher*, 11 Ves. 87. *Fox v. Fox*, 1 Atk. 463.)

In this state, the legal effect of making a debtor executor is changed from what it was at common law, and a rule more consonant to equity is adopted. Thus it is enacted, that the making of any person executor in a will shall not operate as a discharge or bequest of any just claim, which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased in the inventory, and such executor shall be liable for the same, as for so much money in his hands at the time such debt or demand becomes due; and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased. (2 R. S. 84, § 13.)

The subsequent section provides that the discharge or bequest

in a will of any debt or demand of the testator, against any executor named in his will, or against any other person, shall not be valid as against the creditors of the deceased; but shall be construed only as a specific bequest of such debt or demand. It is to be included in the inventory, as has been before stated, and applied in the payment of debts. If, however, there are assets enough to pay debts without it, it is treated as a specific bequest to the executor, and is to be paid in the same manner and in like proportion as legacies of that kind.

At common law, the appointing of a creditor of the testator executor, conferred upon him the power of paying himself first, if his debt was by specialty or of record. (*Wentworth's Ex'rs*, 76.) This right of *retainer*, as it was called, we have seen is abolished in this state. (2 *R. S.* 88, § 33.) The policy of the law is to put all creditors of the same class on an equality, and to permit no debt or claim to be satisfied, when belonging to an executor or administrator until it shall have been allowed by the surrogate. (*Williams v. Purdy*, 6 *Paige*, 166. *Smith v. Kearney*, 2 *Barb. Ch. R.* 533. *Treat v. Fortune*, 2 *Bradf.* 116.)

SECTION III.

Of the person capable of being a legatee, and of certain rules of construction, not only of the will, but with regard to the thing bequeathed, and the person to whom it is bequeathed.

I. It may be remarked, in general, that all persons are capable of being legatees, with some special exceptions. The case of subscribing witnesses to a will, has been considered in a former part of this treatise. A bequest to them is void if the will cannot be proved without them. (2 *R. S.* 65, § 50. 1 *id.* 719. *Caw v. Robertson*, 1 *Seld.* 125.)

With regard to a devise of real estate, it is enacted that such devise may be made to every person capable, by law, of holding real estate; but no devise to a corporation shall be valid unless such corporation is expressly authorized by its charter, or by statute, to take by devise. (2 *R. S.* 57, § 3.)

To constitute a valid legacy or devise, there must be a person, natural or artificial, capable of taking under the will. (*See*

9 *Cranch*, 292.) A mere society or association of individuals, not incorporated, is incapable of being a legatee or devisee, unless, indeed, the case falls under the denomination of charitable uses. (See *Willard's Eq. Juris.* 569 to 598. *Williams v. Williams*, 4 *Seld.* 524, where the principal cases on the subject of charities are collected and reviewed.)

2. *As to construction of wills, generally.* There are some rules of construction applicable to wills, which have been adopted as elementary principles. 1. The intention of the testator must control, if it is not inconsistent with the rules of law. This intention must be collected from the will itself, and from the whole will; and parol evidence is inadmissible to explain, vary, or enlarge the words of it, except in case of a latent ambiguity. (*Covenhoven v. Shuler*, 2 *Paige*, 122. *Rathbone v. Dyckman*, 3 *id.* 26. *Mann v. Mann*, 14 *John.* 1. *S. C.*, 1 *John. Ch. Rep.* 231. 20 *Wend.* 469.) 2. No particular words are necessary to pass an estate, but any words that show the intention of the testator are sufficient. The language of a will should be construed according to its primary and ordinary meaning, unless the testator has manifested an intention, in the will itself, to give it a different signification. (*Hone v. Van Schaick*, 3 *Comst.* 538. *S. C.*, 3 *Barb. Ch. R.* 488. *Matter of Hallett*, 8 *Paige*, 375. *Cromer v. Pinckney*, 3 *Barb. Ch. R.* 466.) 3. The situation of the testator's family, and collateral circumstances, may be considered in construing a will. (*Wolfe v. Van Nostrand*, 2 *Comst.* 436. *Irving v. De Kay*, 9 *Paige*, 522.) 4. In construing a will, words may be transposed to get at the correct meaning. (*Pond v. Bergh*, 10 *Paige*, 140. *Mason v. Jones*, 2 *Barb. S. C. R.* 229.) 5. If two parts or provisions of a will are repugnant, so that both cannot stand, the last will prevail, unless other parts of the will forbid it. (*Bradstreet v. Clark*, 12 *Wend.* 602. *Covenhoven v. Shuler*, 2 *Paige*, 122. *Mason v. Jones*, 2 *Barb. S. C. R.* 229. *Parks v. Parks*, 9 *Paige*, 107.) 6. A subsequent clause, apparently irreconcilable with precedent provisions, will be construed in connection with them, and may be rejected if repugnant to

the intention of the testator, as derived from the whole will. (*Bradly v. Amidon*, 10 *Paige*, 235.) 7. A will and codicil are to be taken and construed together as parts of one and the same instrument. (*Westcott v. Cady*, 5 *John. Ch. R.* 334.)

3. Of the construction of wills, with regard to the *thing bequeathed*. Formerly, in wills of real estate, if the devise contained no words of limitation or perpetuity, the devisee took only an estate for life. (*Jackson v. Wells*, 9 *J. R.* 222. *Jackson v. Embler*, 14 *J. R.* 198.) The courts, however, in order to carry out the intent which is considered the polar star in the construction of testamentary instruments, were accustomed to seize hold of other expressions besides the word "heirs," as affording evidence that a fee was intended to be passed. Thus, it was often held that the word "estate" was sufficient to pass a fee. (*Jackson v. Merrill*, 6 *J. R.* 185. *Same v. Delancy*, 13 *id.* 537, 553, *per Kent, Chancellor*. *S. C.* 11 *id.* 374, *per Yates, J.*) That word was held applicable to both real and personal *estate*, and might include a debt and mortgage.

To avoid disputes with respect to the precise words necessary to convey a fee, it was enacted in the revised statutes that every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms, denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death. (2 *R. S.* 57, § 5.) But this statute only operates upon wills made subsequent to the revised statutes of 1830. Wills executed before that time, are not touched by those statutes. (*Parker v. Bogardus*, 1 *Seld.* 309.)

The introductory clause of a will is very material to the inquiry concerning the intention of the testator in relation to the quantum of estate devised. (*Per Bronson, J., Fox v. Phelps*, 17 *Wend.* 393.) They are, however, often words of course; and in order to enlarge the estate, they should be in some way connected in the body of the instrument, or otherwise with the more important devising clause. (*Per Nelson, Ch. J., in Barheydt v. Barheydt*, 20 *Wend.* 576.)

A devise of all one's right carries a fee simple to the devisee. (*Newkirk v. Newkirk*, 2 *Caines*, 345. 4 *Kent Com.* 535 *et seq.*)

Sometimes a charge upon real estate creates a fee without any other words. Thus, where the charge is on the estate, and there are no words of limitation, the devisee takes an estate for life only; but where the charge is on the *person* of the devisee, in respect to the estate in his hands, he takes a fee by implication. (*Jackson v. Bull*, 10 *J. R.* 148. *Harvey v. Olmsted*, 1 *Comst.* 483, *aff.* 1 *Barbour*, 102.) But to raise a fee by implication, the charge must be absolute, and not contingent. (*Id.*)

A contingent charge on the real estate devised will not carry a fee. A. devised as follows: "As touching such worldly estate wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in the following manner and form;" he then enumerates certain specific legacies, and devises to his son "all the certain lot of land which I now possess, with the farming utensils," &c., and adds, "all these legacies before mentioned to be paid on the 1st May, 1805, and to be raised and levied out of my estate," and then appointed his son H. and another person his executors. It was held that H. took only an estate for life; the charge being on the testator's estate generally, it was contingent as to the real estate, that is, the personalty must be exhausted before the real estate could be resorted to. (*Jackson v. Harris*, 8 *J. R.* 141.) This case was decided before the revised statutes, but the question as to the charge is the same now as it was then.

The foregoing observations relate to devises and charges on the real estate. With regard to the construction of wills of personal estate, or of such as dispose of both real and personal property, a few words will be added.

The word "goods" is *nomen generalissimum*, and when construed in the abstract will comprehend all the personal estate of the testator, as stock, bonds, notes, money, plate, furniture, &c. And a bequest of all the testator's "chattels" will have the same effect as a bequest of all the "goods and chattels." So the word "effects," standing alone, will pass the whole of the testator's residuary estate. (1 *Atk.* 180. 3 *id.* 62. 1 *P. Wms.* 267. *Campbell v. Prescott*, 15 *Ves.* 507.)

Under a bequest of "goods and chattels generally," choses in

action, bank notes being considered as cash, and money to a small amount, and leaseholds also, will pass. (1 *P. Wms.* 267.) But if the words are restricted to a particular place, as "all my goods and chattels at A," bonds and choses in action will not pass, because choses in action have no locality. (*Id. and note. Chapman v. Hart*, 1 *Ves. sen.* 273.)

Under a similar bequest of "goods and chattels in and about my house and out-houses," running horses were held to pass. (*Countess of Gower v. Earl Gower, Ambler*, 612.)

The term "household goods" is an expression of frequent use in wills. It, in general, means articles of a permanent nature, and not consumed in the enjoyment. (*Pratt v. Jackson*, 2 *P. Wms.* 302.) "Household stuff" includes all necessary household utensils appertaining to the personal comfort or convenience of a family, such as tables, beds, &c. ; and plate is held to pass under such a bequest, if commonly used by the testator. (*Masters v. Masters*, 1 *P. Wms.* 424. 2 *Fonb. Eq.* 342 *et seq.* *Bunn v. Winthrop*, 1 *J. Ch. R.* 329.)

The term "household furniture" often occurs in wills. In general, the term embraces such articles of domestic use and convenience as are suitable to the rank and condition of the testator. It does not embrace books or wine. China will pass, unless it constitutes the testator's stock in trade. (*Porter v. Tournay*, 3 *Atk.* 311. *Kelly v. Powlett, Ambler*, 605.)

Under a bequest of "clothes and linen whatsoever," body linen only, and not table linen, was held to pass. (3 *Atk.* 62, 63.)

Where the testator bequeathed to his wife all the rest, residue, and remainder of the moneys belonging to his estate, at the time of his decease, it was held that the word "moneys" must be taken in its ordinary acceptation, and to mean only cash and not bonds, mortgages or choses in action, there being nothing in the will to show that the testator intended to use the word in that extended sense. (*Mann v. Mann*, 14 *J. R.* 1, *aff. S. C.* 1 *J. Ch. R.* 231.) Money, it was said in the same case, means gold or silver, or the lawful currency of the country, or bank notes where they are known and used in the market as cash, or money deposited in the bank for safe keeping, and does not comprehend promissory notes, bonds, mortgages, or other securities.

The term "stock" has different meanings, and the construction to be given to it in a will, depends on other parts of the instrument, and perhaps the occupation or condition of the testator. Thus, under this denomination, are embraced money in the public funds, an interest in an incorporated company, as bank stock, turnpike stock and the like; and cattle, such as oxen, cows, &c. and it would seem growing crops. (*Cox v. Godslave*, 6 *East*, 604, *note*. *West v. Moore*, 8 *id.* 339.)

Under a bequest of "movables," will pass both goods actively and passively movables. (*Swinb.* 930.) It is said debts will not pass under this general term; though it is supposed this latter construction is altered by the addition of the word "whatsoever." "Immovables" are held to relate to things attached to the freehold, as trees and the like. The expression "in door movables," and "out of door movables," is of frequent occurrence. The former has a similar meaning to household furniture and the latter to farming utensils, cattle and the like. But neither term seems to comprehend money, choses in action, stock in trade, or things appertaining to the person, such as clothing. (2 *Fonb. Eq. b.* 14, *pt.* 1, *ch.* 1, §§ 8 to 11, *and notes.*)

A will of personal property speaks from the death of the testator. Hence, the general rule is that a will of personal property, unless there are qualifying expressions, conveys all the personal estate of which the testator was possessed at his death. (*Van Vechten v. Van Vechten*, 8 *Paige*, 104. *Collin v. Collin*, 1 *Barb. Ch. R.* 630.)

4. Of the construction of wills with regard to the *person* to whom the bequest is made. It is quite obvious that a party claiming a benefit under a will must show himself to be the person intended as the object of the testator's bounty. The imperfection of human language, and the infirmity of the human memory, often lead to doubts and uncertainties which can be solved only by the courts. The testator may forget the name of the individual to whom he desires to give a legacy, or he may be mistaken in some of the circumstances which tend to show his identity, or he may describe him in such a way or in such language as to leave a doubt as to his meaning.

A mere misdescription of the legatee does not render a legacy

void, unless the ambiguity be such that it is impossible to ascertain, either from the will itself or from proof *dehors* the will, who was intended as the object of the testator's bounty. *Smith v. Smith*, 4 *Paige*, 272.)

If the context of the will affords sufficient evidence of the identity of the person intended as the legatee, the will alone must be looked to in order to clear up the difficulty and determine the question. If this be insufficient, after examining the whole will, recourse must be had to parol evidence. (*Smith v. Smith*, 2 *Edw. V. Ch. Rep.* 189.)

If there be no persons answering the description of the legatees, in the legal sense of the term used in describing them, it is allowable to prove the situation of the testator's family, to enable the court to ascertain the legatees intended. (*Gardner v. Heyer*, 2 *Paige*, 11.)

A legacy or devise to children without other description, as a general rule, means, legitimate children; and if the testator has such children, parol evidence cannot be received to show that a different class of persons was intended; but he having only illegitimate children, proof of circumstances *dehors* the will may be given to show that they were the children intended. (*Id.*)

Under the devise to children as a class, an illegitimate child cannot take, if there be legitimate children living at the time of making the will, unless there is something in the will to show a contrary intention of the testator. (*Collins v. Hoxie*, 9 *Paige*, 81.)

The general rule, laid down by Mr. Preston, and which is well supported by the authorities, is, that under a bequest to a class of persons to vest in possession, at the testator's death, all answering the description, and in *esse* at that period, will be entitled, this being the time at which the objects are to be ascertained, and the division to take place. For the same reason, where the fund is given to be enjoyed at a future period, all persons born before that period, and in *esse* at the specified time, will be entitled. Upon the same principle, where a bequest is made to one for life, with a limitation over after the death of the tenant for life to a class of persons, as children, &c. all persons answering the description at the testator's death, and who from time to time shall answer the

description previous to the division of the fund viz, during the life of the tenant for life, and who shall be in *ventre sa mere* at the death of the tenant for life, will be embraced. And the representatives of such of those deceased legatees, who have answered the description subsequent to the testator's death, and before such division, will be entitled, equally with those legatees who shall be *in esse* at the time of the division. In all these cases the court acts from an anxiety to provide for as many children as possible with convenience. Any children, therefore, coming in *esse* before a determinate share becomes distributable to any one of the children, will be included. (*Preston on Legacies*, 191 *et seq.* and the cases cited.)

The word "children" does not include grandchildren, or any other than the immediate descendants in the first degree, of the person named as the ancestor. But it may include them where there were no children in existence at the time of the making the will; or where there could not be any children at the time, or in the event contemplated by the testator; or where the testator has clearly shown, by the use of other words, that he used the word children as synonymous with descendants, or issue, or to designate or include illegitimate offspring, grandchildren or step children. (*Mowatt v. Carow*, 7 *Paige*, 328.)

"Nephews and nieces" in the ordinary and primary sense of the words, do not include grand nephews and grand nieces, or more remote descendants; but even if the testator leaves nephews and nieces, the situation of the testator's family relatives, and the fact that one of his sisters had at the time the will was made grandchildren, but no children, may be taken into consideration with the provisions of the will itself, to show that he meant to include grand nephews and grand nieces, and even a great grand niece, in the class of nephews and nieces. (*Cramer v. Pinckney*, 3 *Barb. Ch. R.* 466.)

Under a bequest to "descendants," all the issue of the testator will be included, however remote. (*Crossly v. Clare*, *Ambl.* 397.)

Where the term "heirs" is used to denote succession as a legacy "to the heirs of A," it means such persons as would legally succeed to the property according to its nature and quality. If it is personal property, the next of kin of A are entitled; if real property, his heirs at law; who may in some instances, even under our

statute, be a different class of persons from the next of kin. (1 *Jac.* §• *Walk.* 388, *Vaux v. Henderson.*) But where the word is not used to denote succession, but to describe a legatee, and there is nothing in the other parts of the will to explain it, there is no reason, it would seem, to depart from the natural and ordinary sense of the word "heir." And in such a case if there are more heirs than one, they all take jointly. (*Mounsey v. Blamire*, 4 *Russell*, 384.)

Under a bequest to the "issue" of A, all the descendants of A, viz., children, grandchildren, &c., are included. They take in such a case *per capita* and not *per stirpes*. (3 *Bro.* 257.)

A bequest to "next of kin" is confined to those persons who are entitled under the statute of distribution, as nearest of kin, and does not include those who claim by representation, or the widow. (*Garrick v. Lord Camden*, 14 *Ves.* 373.)

A bequest by a husband to his "beloved wife," not mentioning her by name, applies exclusively to the individual who answers the description at the date of the will, and is not to be extended to an after taken wife, unless the will shall have been republished after the second marriage. (*Garrat v. Niblock*, 1 *Russell & Mylne*, 629. 5 *Ves.* 676.)

A bequest to "legal representatives" is held to point to such persons as are embraced in the statute of distributions; but a bequest to "personal representatives" has been held to include the executor. (*Jennings v. Gallimore*, 3 *Ves.* 146. 1 *Anst.* 128.)

Uncertainty in the description of the legatee, or ambiguity in a will, sometimes defeats altogether the object of the testator. If the difficulty be such that it cannot be obviated by parol proof, the legacy will fail.

But a misnomer of a legatee, or a mistake in his name, will not defeat the legacy, provided it can be satisfactorily shown, who was intended by the testator. (*Thomas v. Stevens*, 4 *J. Ch. R.* 271. *Connolly v. Pardon*, 1 *Paige*, 291. *Banks v. Phelan*, 4 *Barb. S. C. R.* 80.)

A mistake or ambiguity may be corrected or explained either by the context or by parol proof. (*Stockdale v. Bushby*, 19 *Ves.* 381.)

There are two kinds of ambiguity, viz: a *patent ambiguity* and a *latent ambiguity*. A *patent ambiguity* is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible; as if in a will there were a blank left for the devisee's name. (*Broom's Maxims*, 469. *Smith on Contracts*, 28.) Such an ambiguity cannot be explained by parol proof. (*Tole v. Hardy*, 6 *Cowen*, 341.)

A *latent ambiguity* is where the instrument itself is on the face of it intelligible enough; but a difficulty arises in ascertaining the identity of the subject matter to which it applies, as if a devise were to *John Smith*, without further description. This devise is perfectly intelligible until it comes to be shown that there are more John Smiths than one. It then becomes uncertain which of them was intended. As this ambiguity is created by the proof of extrinsic facts, so it may be removed in the same way. (*Tole v. Hardy*, *supra*. *Smith on Contracts*, 28. 1 *Greenl. Ev.* § 297, *et seq.* *Phillips' Ev.* 534 to 538, 4 *Am. from 7th Lond. ed. and Cowen & Hill's Notes to same.*)

CHAPTER IV.

OF THE PAYMENT OF LEGACIES, AND HEREIN OF THE PAYMENT OF THE RESIDUE, AND OF DISTRIBUTIVE SHARES.

SECTION I.

Of the time of payment.

The general rule is, that legacies are not to be paid until the debts of the deceased are all satisfied. If, in any case, a legacy is directed to be paid before the period has elapsed for exhibiting claims against the estate, the executor or administrator is authorized to require a bond from the legatee with two sufficient sureties, conditioned to refund the whole, or a ratable proportion, in case of a deficiency of assets. (2 *R. S.* 90, § 44.)

At common law the time allowed for paying a legacy was a year from the death of the testator, where no time was specified in the

will. Our statute directs that no legacy shall be paid by an executor or administrator until after the expiration of one year from granting letters testamentary or of administration, unless the same is directed by the will to be sooner paid. (*Id.* § 43. *Bradner v. Falkner*, 2 *Kernan*, 472.)

If the will does not direct it to be sooner paid, the surrogate has no power, on the application of a legatee, or a relative entitled to a distributive share, except when needed for the support of the applicant, and which will be noticed hereafter, (2 *R. S.* 98, §§ 82, 83; *Seymour v. Butler*, 3 *Bradf.* 193,) to decree payment of such legacy or distributive share, or its proportional part, until after one year has elapsed from the granting of letters testamentary or of administration. (2 *R. S.* 116, § 18.) If the executor or administrator has pursued the course pointed out by the statute of obtaining an order and publishing notice to exhibit claims against the estate, of which we have treated in a preceding chapter, he will be able, at the expiration of a year from the date of his letters, to ascertain the condition of the estate. If he finds it such as to enable him to satisfy the debts and legacies, he may then proceed to discharge both. He will incur no risk in paying legacies, and cannot exact a bond from the legatee. Should a subsequent claim arise, after payment of all the assets to the creditors, legatees, and next of kin, the executor is not responsible; but the claimant must follow the assets into the hands of the legatees and next of kin to whom they have been paid. As has already been remarked elsewhere, he assumes that the claims presented under the six months' notice, embrace all that exist against the estate, and acts accordingly. Parties having demands against the estate, either as legatees, creditors, or next of kin, have a right to presume that the executor or administrator has adopted the steps pointed out by the statute, and to require payment of their respective claims.

It is important, as well for the safety of the executor or administrator as for the interest of those persons to whom as creditors, legatees, or distributees, the estate in truth belongs, that the former should pursue the steps pointed out by the statute. The provisions of the act allowing an executor or administrator, after the expiration of eighteen months from the date of his letters, to

render a final account of all his proceedings, and which allow him to render such account, when cited by some person having a demand on the estate, and thus obtain a final settlement, seem to be based on the supposition that the executor or administrator has pursued the requisite steps to notify the creditors to present their demands. It is a general principle that a decree binds no person who is not a party to the proceeding. Creditors who have not been called upon by a notice to present their claims cannot fairly be deemed guilty of laches by not exhibiting them. At common law the debtor is required to seek the creditor; the statute inverts this order of things in favor of parties thus acting in a representative capacity.

SECTION II.

Of the assent of the executor to a legacy.

The entire personal estate of the testator vests, at his death, in his executors, who hold it in trust for the creditors, legatees, and persons entitled to a distributive share of the surplus. It is essential for their protection that no legatee, whether general or specific, should be permitted, without the assent of the executor, to interfere with the estate. They must take care to satisfy debts before legacies. (*Tole v. Hardy*, 6 Cowen, 539. *Wentworth Ex.* 408.) The legatee cannot take the thing bequeathed without the permission of the executor. Before the assent of the latter, the legatee has only an imperfect and inchoate right to the thing given; such, however, as is transmissible to his own personal representatives. (*Went. Exr's*, 69, 70.)

If an executor improperly refuses his assent, he may be compelled to give it by a court of equity. (*Went. Exr's*, 70.) This assent is presumptive evidence of assets to pay both debts and legacies. The surrogate's court has the same power to compel the assent of an executor to a legacy as a court of equity. This results from the general power of the court over the subject matter, and the expressed power, conferred by law, "to direct and control the conduct of executors and administrators." (2 R. S. 220, § 1.)

The assent of the executor may be either *express* or *implied*.

It may be absolute or conditional. (*Went. Ex'rs*, 414.) It could, at common law, be given before probate, but with us it is believed it cannot be given, until letters testamentary have issued to the executor; for, until then, he can do no act to bind the estate. (2 *R. S.* 71, § 16.)

The assent of the executor is not necessary where the legacy is charged on, or payable out of real estate. (*Touchstone*, 2d vol. 455. *Tole v. Hardy*, 6 *Coven*, 339.)

The remedy given to the legatee, to proceed in the surrogate's court to obtain the legacy, after the expiration of a year from the date of the letters testamentary or of administration, is not founded on any supposed assent of the executor to the legacy, nor can it be defeated by withholding his assent, if the assets are sufficiently ample. (2 *R. S.* 116, § 18.) The surrogate's court, in this respect, exercises all the powers of a court of equity; and can decree payment of the whole, or a proportional part, under the same circumstances, which would justify the same relief in a court of equity.

The assent of the executor has relation to the death of the testator. This has reference to the transmissibility of the legacy to the personal representatives of the legatee, in case he survives the testator, and dies before payment.

SECTION III.

Of the order in which legacies are to be paid, and of abatement of legacies.

The duty of the executor, in this respect, is defined by the statute, by which it is enacted that, after the expiration of one year from the granting of any letters testamentary or of administration, the executors or administrators shall discharge the *specific* legacies bequeathed by any will, and pay the *general* legacies, if there be assets; and if there be not sufficient assets, then an *abatement* of the *general* legacies shall be made in equal proportions. (2 *R. S.* 90, § 45.)

This enactment is merely declaratory of the then existing law, and not introductory of a new rule, except in fixing the *date* of the letters, instead of the *death* of the testator, as the period from

which the one year is to be computed. (*Preston on Legacies*, 276.)

The specific legacies are thus first to be discharged in full, and then the general legacies; but if the assets are insufficient to pay all, then the *general* legacies, but not the *specific* legacies, are subject to abatement.

This privilege of the specific legacy is some compensation for the risk it encounters of being destroyed by the principle of ademption, without any claim to contribution from the other legatees. (*Hinton v. Pinke*, 1 *P. Wms.* 540.)

Although it is the general rule that specific legacies shall not abate in favor of general legacies, yet the rule may be in some instances controlled by the intention of the testator. Thus, if a man devises specific and pecuniary legacies, and afterwards says that such pecuniary legacies should come out of all his personal estate, or words tantamount, if there is no other personal estate than the specific legacies, they must be intended to be subject to those that are pecuniary, otherwise the bequest to the pecuniary legatees would be altogether nugatory. (*Toller*, 340. 2 *Fonb. Eq. pt. 1, ch. 2*, § 5.) But if there is nothing in the will indicating a contrary intention, and the assets are sufficient to pay the debts and specific legacies, those legacies must be paid in full; and they cannot be required to contribute towards the payment of the general legacies. (*Hinton v. Pinke*, *supra*.)

But though the general rule be as stated in the statute, it must be understood as applying only to legacies, which are mere gratuities; for if there be a valuable consideration for the testamentary gift, as where a general legacy is given in consideration of a debt owing to the legatee, or of the relinquishment of any right or interest, as of her dower by a widow, such legacy will be entitled to a preference of payment over the general legacies, which are mere bounties. (*Burridge v. Bradyl*, 1 *P. Wms.* 127. *Williamson v. Williamson*, 6 *Paige*, 298. *Heath v. Dendy*, 1 *Russ. Ch. R.* 543.) The legatee, in such cases, is considered rather as a purchaser than a volunteer.

A similar preference has been extended to legacies of piety, notwithstanding the general language of the statute; as where the legacy was for the erection of headstones at the graves of the

testator's parents, or other near relatives. Such legacy the chancellor said should be paid in full, and not abate ratably with the general legacies. (*Wood v. Vandeburgh*, 6 Paige, 278.)

But a legatee is not deemed a purchaser where the debt to pay which it was bequeathed was the debt of a relative or a friend, which the testator was under no legal liability to pay. Such bequest is a mere bounty, and in no better condition as to abatement than other legacies. (*Shirt v. Westby*, 16 Ves. 394.)

Priority may, however, be *expressly* given by the testator to one general legacy over another. (*Marsh v. Evans*, 1 P. Wms. 688. *Preston on Legacies*, 359.) It is based on the principle of *intention* of the testator, which must obviously control where it is clearly manifested. The intention sometimes may be gathered by an unequivocal implication. This is the case where a bequest is made of a sum of money payable out of a particular fund, called a *demonstrative* legacy. It differs, we have seen, in some respects, from a specific legacy, because it does not fail by the destruction of the fund if there be other assets out of which it can be made. But by pointing to a particular fund, the testator indicates a desire that the legatee should be preferred to the other general legacies. (*Preston on Legacies*, *supra*. 2 Wms. Ex'rs. 1174.)

Nor are these principles incompatible with the statute before cited. (2 R. S. 90, § 45.) The statute deals in general terms, and was doubtless intended for the regulation of the conduct of the executors or administrators, in cases where the testator had not indicated a different intention, either expressly or by implication. This construction satisfies the letter as well as spirit of the act.

The rule on failure of assets to satisfy all the claims against the estate, is, first to make the general legacies abate, and if necessary take the whole, for the payment of debts. If there is still a deficiency, resort is then to be had to the demonstrative and specific legacies. General and specific legatees abate between themselves, according to the value of their legacies, at the time they are payable. Where no time is mentioned in the will, a year from the date of the letters testamentary or of administration, is the time at which the computation must be made. (2 R. S. 90, § 45. *Bradner v. Faulkner*, 2 Kernan, 472.) But if the testator has given any *express* direction in his will with regard to priority, such

direction must be obeyed. No particular form of words is prescribed for this purpose. Any language which clearly indicates the testator's intention will suffice. But mere general expressions, as "in primis," or, "in the first place," I give so much to A, are not sufficient to entitle the legatee to a preference over others in the same class. (*Brown v. Allen*, 1 *Vernon*, 31.)

SECTION IV.

Of the person to whom the legacy is to be paid.

In order to discharge an obligation by payment, it is obvious that the payment must be made to the party having the legal authority to receive it. The honest intention of the executor will afford no excuse for a misapplication of the bequest; and, therefore, if he pays it to one not strictly entitled, he will be compelled, notwithstanding, to pay it over again to the rightful claimant.

The principal difficulty which formerly existed on this subject, was in regard to the payment of legacies belonging to infants. Many of the embarrassments attending this point, have been obviated by the New York revised statutes; which, while they have greatly relieved the executor of responsibility, have, nevertheless, guarded the rights of the infant. If, in some instances, an infant may still suffer by the dishonesty of guardians, or the insolvency of sureties, it is a calamity incident to his condition which civil institutions cannot always prevent.

At common law, the father, as guardian by nature merely, was not allowed to receive legacies bequeathed to his infant children. (*Genet v. Tulmadge*, 1 *J. Ch. R.* 3.) This prohibition extended to legacies, or distributive shares of any amount, however small or great. But now, by the revised statutes, executors are authorized to pay to the father of the infant legatee, to whom a legacy under the value of fifty dollars is bequeathed, for the use and benefit of the legatee. (2 *R. S.* 91, § 46.) In this case, therefore, the receipt of the father on the money being paid, is a protection to the executor. The father is not required to give any security either to the executor or to the infant. The father thus becomes a trustee for the infant of the sum received, and is liable to account to him on his coming of age. Whether, in case the father be dead, the

mother, who thus becomes the guardian by nature, would be entitled to receive the legacy for the benefit of the infant, as coming within the equity, though not within the words of the statute, has not yet been decided.

If the legacy be of the value of fifty dollars or more, it may be paid under the direction of the surrogate to the general guardian of the minor, who is required to give security to the minor to be approved by the surrogate for the faithful application and accounting for such legacy. (2 R. S. 91, § 47.) The father may be appointed such guardian. (*Genet v. Talmadge, supra.*) But it will be seen hereafter, that such appointment must be made by the supreme court, the surrogate having no power to appoint a general guardian for an infant during the life of the father. (*See post, ch. 6, part 3.*)

The security given by the guardian on his appointment, is taken with reference to the infant's property at that time. Whether it is an adequate protection for the infant, when the legacy is to be paid, depends on a variety of circumstances; and, therefore, it is expedient that additional security should be required. The matter is usually brought before the surrogate by petition, and he, after inquiring into the matter, in a summary way, makes an order for the payment of the money by the executor to the guardian of the infant legatee, on his entering into the requisite security. The order should be entered in the book of minutes, and the bond, after being duly acknowledged or proved, should be filed in the office of the surrogate. A payment in pursuance of this order is a complete protection to the executor, whether the sureties prove to be insolvent or not.

It is further provided, in a subsequent section, that if the infant has no general guardian, or if the surrogate does not direct the payment to such guardian, the legacy shall be invested in permanent securities, under the direction of the surrogate, in the name and for the benefit of the minor, upon annual interest; and the interest may be applied, under the direction of the surrogate, to the support and education of the minor. (2 R. S. 91, § 48. *McLoskey v. Reid*, 4 *Bradf.* 334.) It is the duty of the executors or administrators to perform this requirement. There may be satisfactory reasons against directing the payment of the money to the general

guardian, or the infant may have none. The executors, after ascertaining the state of the assets, should present the facts to the surrogate, in the shape of a petition, indicating therein the proposed mode of investment. The surrogate, after inquiring into the facts in a summary way, will, if he deems it for the interest of the infant, direct the investment, or make such other order in the premises as shall be just. These securities are to be kept by the general guardian, if there be one, and the interest is to be received by him, and applied, under the direction of the surrogate, to the support and education of the minor.

In case the minor has no guardian, the surrogate is required to receive the securities from the executors or administrators, and keep them in his office; to collect, receive and apply the interest for the support and education of the minor; and, when necessary, to collect the principal, and reinvest the same, and also reinvest any interest that may not be necessarily expended as aforesaid. (2 R. S. 91, § 49.) On arriving at age, the minor is entitled to receive from the surrogate the securities so taken, and the interest or other moneys that may have been received; and the surrogate and his sureties are liable to account for the same. (*Id.* § 50.) In effect, the surrogate in such a case acts, so far as the management of the legacy is concerned, as a guardian of the minor. In case of the death of the minor before coming of age, the securities and moneys go to his executors or administrators, to be applied and distributed according to law; and the surrogate and his sureties are liable, in like manner, to account to such executor or administrator. (*Id.* § 51.)

With regard to the nature of the investment of the infant's legacy, the surrogate doubtless has a reasonable discretion. He may direct it to be loaned out on bond and mortgage for the benefit of the infant. In such case, the security should be taken to the infant. The mortgage should be on unincumbered real estate, of at least double the cash value of the sum loaned, exclusive of buildings.

An investment, attended with less trouble and responsibility to the surrogate, and equally safe for the infant, is authorized by the act to incorporate the New York Life Insurance and Trust Company. (*L. of 1830, ch. 75. L. of 1834, ch. 250. Willard's Lq.*

Juris. 558.) By this statute it is enacted that in all cases where an application shall be made to the court of chancery, now the supreme court, or to a surrogate having jurisdiction, for the appointment of a guardian of any infant, the annual income of whose estate shall exceed the sum of one hundred dollars, the court shall have power to appoint the said company as guardian of the estate of such infant.

The fourth section of the act provides, that on any sum of money not less than one hundred dollars, which shall be collected or received by the said company, in its capacity of guardian and receiver, an interest shall be allowed by the said company of not less than the rate of four per cent annually; which interest shall continue until the money so received shall be duly expended or distributed. A subsequent section provides that where the annual income of the infant's estate, of which they are guardian, shall exceed the sum allowed, or which may be sufficient for the education and support of such infant, such surplus income shall be accumulated by the said company, for the benefit of such infant, by adding interest on the whole as a new principal; and the interest so to be allowed and added on such annual accumulation shall in no case be less than four per cent. The company, when thus appointed guardian, are not required to give a bond or other collateral security. But all investments of moneys received by the said company, as guardian, are declared to be at the risk of the said corporation; and for all losses of such moneys the capital stock, property and effects of the said corporation are made absolutely liable; and in case of the dissolution of the said company by the legislature, or by the supreme court, or otherwise, the debts due from the company as guardian are declared to have a preference.

Should the surrogate adopt the trust company as the depository of money paid into court for infants, he should cause an appointment of the company by its corporate name, to be made out under the seal of the court, and recorded in the proper book. The order for the appointment should be, as in other cases, entered in the book of minutes. He should open an account with the company, and between himself and the infant, which would be appropriately entered in the book for guardians' accounts, which he is directed by law to keep. (2 *R. S.* 222, § 7, *subd.* 5.)

The trust company, however, cannot be appointed guardian unless the annual income of the infant's estate exceeds \$100. If this income is derived from the rent of real estate, or other secure investments on real property, it would not be necessary, or advisable, to break up the investments, and make the company guardian.

This company is also authorized to receive moneys in trust, and to accept and execute all such trusts of every description, as may be transferred to them by order of the supreme court or by any surrogate. It forms, therefore, a safe and convenient depository of money, paid into court for infants or others, either on legacies, or on other accounts.

At common law, a legacy bequeathed to a married woman must be paid to her husband. (*Palmer v. Trevor*, 1 Vern. 251. *Howard v. Moffatt*, 2 John. Ch. R. 206.) But if he had to invoke the aid of a court of equity, to enable him to get possession of his wife's property, that court would require him to do what was equitable, by making a reasonable provision out of it, for the maintenance of her and her children. (*Id.*) It was always in the power of the testator so to frame the bequest as to exclude the husband, and to allow the payment to the wife alone, or her order. Any language in the legacy indicating the intention of the testator that the legacy should be "for her own use," or "for her own disposal," and the like, would be sufficient for this purpose. (*Shirley v. Shirley*, 9 Paige, 363. *Willard's Equity Juris.* 559.)

The power of courts of equity in this class of cases was always exercised for the benefit of the wife; and hence if she came into court and waived a settlement and consented to the payment to her husband, the court would make the order accordingly. It was usual, also, when the sum was not large, and the parties lived together, and the husband supported the family as far as he was able, for the court of chancery to dispense with a settlement, and allow the husband to receive the legacy.

This subject is now provided for by the acts of 1848 and 1849, for the more effectual protection of the property of married women. (*Laws of 1848*, p. 307. *Laws of 1849*, p. 528.) The third section of the act as amended in 1849, allows any married female

to take by inheritance or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband nor be liable for his debts.

A bequest to a married female which takes effect after the statute of 1849, is undoubtedly payable to the wife, and her discharge will be a protection to the executor. A payment to the husband without authority from the wife, would not operate as a discharge. Nor can the creditors of the husband ever reach it without the assent of the wife. (*See Willard's Eq. Juris.* 640, 641, *remarks on these statutes.*)

It is deemed not inappropriate to the present head, to consider the practice in the case of legacies payable at a future period. Although legatees are in no case entitled to receive their legacies before the time of payment arrives; yet, it seems, they are entitled to go into a court of equity and pray that a sufficient sum be set apart to answer the legacy when it becomes due. The court will, in such a case, compel the executor to bring into court money in his hands, or give security for its payment when the legacy is payable at a future day. (*Lupton v. Lupton*, 2 J. Ch. R. 614.)

Where there is a bequest for life or other limited period, with a limitation over, of specific articles not necessarily consumed in the using, the modern practice is only to require an inventory and receipt from the first taker, specifying that they belong to him for the particular period only, and then to the remainderman; and security is not required, unless there is danger that the articles may be wasted, or otherwise lost to the remainderman. (*Covenhoven v. Shuler*, 2 Paige, 122. *De Peyster v. Clendinning*, 8 Paige, 295. *Spear v. Tinkham*, 2 Barb. Ch. R. 211.)

Where an estate for life, or any interest short of absolute ownership, was given in the general residue of the personal estate, terms for years, and other perishable funds, or property which might be consumed in the use, was to be converted and invested in such a way as to produce a permanent capital, and the legatee be entitled only to the interest or income of such capital, it was held by the

chancellor that the legatee was not entitled to all the tolls of a toll-bridge, being a franchise for years owned by the testator, but only to such portion of them as would equal the interest of a capital equivalent to the cash value of the franchise at the time of the testator's death. (*Cairns v. Chaubert*, 9 *Paige*, 160.)

It has sometimes been made a question, whether on a bequest of the *use of the residue of personal estate for life*, the executor should retain the fund and pay the income to the legatee, or should transfer the principal to the legatee on receiving sufficient security for its return. In *Clark v. Clark*, 8 *Paige*, 160, which came before the late chancellor on appeal from a surrogate's court, the chancellor held that either course might be adopted, at the discretion of the executor, though a preference was given to the former course. If in such a case an executor pays over the fund to the legatee, without security, and it is squandered by the legatee, the executor will be liable to replace it, though he acted in good faith, when he paid it to the legatee for life. (*Id.*)

The foregoing cases are enough to illustrate the general principles applicable to this subject. The practical duty of the executor or administrator in cases of this kind, where a *specific article*, not necessarily consumed in the using, is bequeathed to one for life, with remainder over, is, after the period for paying the legacy has arrived, to deliver the article bequeathed to the tenant for life, and to take from him a written inventory and agreement, setting forth his own interest in the property, and acknowledging that on his death it belongs to the person in remainder. The inventory and agreement should be delivered to the remainderman, who is alone interested in it. The executor or administrator cannot be held responsible for the abuse of the article by the particular tenant. His duty is fully performed, on delivering it to the person first entitled to use it, and taking from him the inventory and delivering it to the remainderman.

Where there is a *general bequest* to one for life, and remainder over, the executor should convert the whole into money and invest it in permanent securities. The interest only is payable to the tenant for life, and on his death the residue belongs to the remainderman.

Such is the difference between a *specific* and *general* legacy, where the first legatee is not entitled to the whole interest, and the rights of the remainderman are to be considered and protected by the court.

SECTION V.

Of interest on legacies ; of the increase of specific legacies ; of legacies charged on land ; and of refunding legacies.

It is competent for the testator to declare whether the legacies bequeathed by him shall bear interest ; and to prescribe the rate *per cent*, and the time from which it shall be computed.

In case he makes no mention of the subject of interest, the question whether the legacy bears interest or not, and from what time, is established by the rules of law, founded on the presumed intention of the testator, and the equity of the case.

1. Where no time is fixed by the testator in the will, it has been seen that the legacy becomes due and payable at the end of a year from the date of the letters testamentary. At the end of this time, and not before, if the will is silent on the subject, interest is to be computed on the legacy. (*Bradner v. Faulkner*, 2 Kernan, 472. *Glen v. Fisher*, 6 J. Ch. R. 33. *Birdsall v. Hewlett*, 1 Paige, 33.) It is the general rule that all legacies draw interest after they are payable ; whether the time limited for their payment is fixed by the testator in his will or by the statute. Interest is given for delay of payment ; and the executor cannot be considered in default unless he withholds payment after the legacy is due. (*Hepburn v. Hepburn*, 2 Bradf. 74.)

There are some exceptions to this rule. One is, where a legacy is given by a parent to a child, and no other provision is made for its maintenance, interest will be computed from the death of the testator. (*Lupton v. Lupton*, 2 J. Ch. R. 614. *Van Bramer v. Hoffman*, 2 J. Cases, 200.) But if the support and maintenance of the child be otherwise provided for by the bounty of the testator, his legacy, like other legacies, is not payable, nor does it draw interest until the lapse of a year from the date of the letters testamentary. (*Williamson v. Williamson*, 6 Paige, 298. *Burtis v. Dodge*, 1 Barb. Ch. R. 77.) Another exception is, where a

legacy is given to the widow in lieu of dower. In such a case, interest is allowed from the testator's decease. (*Seymour v. Butler*, 3 *Bradf.* 193.) So also an annuity bequeathed generally, commences from the testator's death. (*Craig v. Craig*, 3 *Barb. Ch. R.* 76.)

2. Where the testator directs in his will the legacy to be paid with interest, *and does not specify the time from which it is to be computed*, the interest does not commence until one year from the date of the letters testamentary or of administration. In short, it commences from the time when the legacy would have been payable, if the time of payment had not been fixed by the will. (2 *Sim. & Stu.* 490. *Lawrence v. Embree*, 3 *Bradf.* 364.)

Where there is a *specific* bequest of bank stock, the legatee is entitled to the dividends which accrued after the death of the testator. (*Barrington v. Tristram*, 6 *Ves.* 349.) It is otherwise where bank stock is bequeathed by a general legacy; and the rule is not altered, in this respect, in favor of a bequest to a widow in lieu of dower. (*Tift v. Porter*, 4 *Seld.* 516.)

A *specific* legatee of mares, cows, or ewes, is entitled to the brood fallen between the death of the testator and the assent of the executor to the legacy. (*Went. Ex.* 445.) The reason is, the assent, when given, has relation back to the time of the testator's death, as has been before shown.

There are cases which hold that legacies charged on land, when no time of payment is mentioned, draw interest from the death of the testator, (*Van Bramer v. Hoffman*, 2 *John. Cases*, 200,) on the principle that land yields rents and profits. But the authority of this case may well be questioned, as that was not a point necessary to be decided, and the contrary doctrine is held in England. (*Toller*, 324. *Pearson v. Pearson*, 1 *Sch. & Lef.* 10.)

If land is devised subject to the payment of legacies, the devisee, after accepting the devise, is personally liable for the legacy; and he must pay interest on it from the time it was payable, whether it was demanded or not. (*Glen v. Fisher*, 6 *John. Ch.*

R. 33. Birdsall v. Hewlett, 1 Paige, 33. Tole v. Hardy, 6 Cowen, 333.)

Where real estate is devised subject to the payment of certain legacies, and the devisee refuses to accept the devise and pay the legacies, the land descends to the heirs, and the legatees are entitled to pursue it in their hands in order to obtain their legacies. And a court of equity will give them relief for this purpose. The intent of the testator cannot otherwise be carried into effect. (*Birdsall v. Hewlett, supra. Harris v. Fly, 7 Paige, 421.*) The remedy of the legatee in such a case is in equity, and cannot be asserted in the surrogate's court.

With regard to the words necessary to create a legacy a *charge* on real estate, a few words will be added to what has been said with respect to a *charge* of *debts* on real estate. (*See chapter 1 of part III, section 2, pages 328, 9.*) A legacy is never charged on the real estate of the testator, unless the intention of the testator to that effect is expressly declared in the will, or is clearly to be inferred by the language and disposition of the instrument. (*Lupton v. Lupton, 2 John. Ch. R. 614.*) An *express* charge is, where the testator in terms charges the legacy on his real estate, or directs it to be made out of his real estate, or the like. An *implied* charge is where an *estate*, consisting of real and personal property, is given by will to a person who is directed to pay the legacy out of *the estate*. The legacy is, in such a case, an equitable charge on the real estate; but still the personal estate is the primary fund for its payment; and the legatee cannot resort to the real estate in the hands of the purchasers from the devisee, without showing that the personal property has been properly exhausted, or that those who are accountable for it are irresponsible. (*Dodge v. Manning, 11 Paige, 334. Harris v. Fly, 7 Paige, 421.*)

The usual residuary clause in a will, inserted to prevent an intestacy, as, "I give all the rest and residue of my estate, real and personal, not before devised," is not sufficient for this purpose. (*Lupton v. Lupton, supra.*) Where a testator directs his debts and legacies to be *first* paid, and then devises real estate, or where he devises the *remainder* of his estate, real and personal, *after*

payment of debts and legacies; or devises real estate *after* payment of debts and legacies, it has been held that the real estate was charged. So, too, where the devisee of real estate is appointed executor, and is expressly directed to pay debts and legacies, the charge will be created. (*Reynolds v. Reynolds*, 2 *Smith*, 16 *N. Y. R.* 259, and the cases there collected.) So, also, in *Lewis v. Darling*, 16 *How. U. S. Rep.* 1-9, the testator left to his daughter all of his property of every kind, which might remain *after the antecedent bequests and devises in his will had been paid*, (page 9 of the opinion of *Wayne, J.*), the legacies and debts were well charged.* (And see *Rafferty v. Clark*, 1 *Bradf.* 473.)

But though the real estate be well charged, yet the personal estate is the proper fund for the payment of debts and legacies, and is to be first applied before charging the real estate. (*M'Kay v. Green*, 3 *John. Ch. R.* 56. *Lupton v. Lupton*, *supra*. *Kelsey v. Western*, 2 *Comst.* 500.) Indeed, where the personal estate is not in terms exonerated, and is not absolutely bequeathed by the will, it will be deemed the primary fund for the payment of the legacies, although the latter are expressly charged on the devisees. The charge in such a case is in aid, and not in exoneration of the personal estate. (*Hoes v. Van Hoesen*, 1 *Comst.* 120, *aff.* 1 *Barb. Ch. R.* 379.)

There are certain circumstances under which legatees are bound to refund their legacies. They have been adverted to in a previous chapter. If a bond has been taken from the legatee in pursuance of 2 *R. S.* 90, § 44, the most convenient remedy, in case the contingency therein provided for occurs, is at law, by action on the bond. There is also a remedy by the creditor and other legatees in equity in such cases. (*Lupton v. Lupton*, 2 *John. Ch. R.* 614.) If the executor has pursued the course pointed out by the statute, for the presentation of claims against the estate, and which has been described in a previous chapter, such creditors

* In *Tracy v. Tracy*, 15 *Barb. S. C. R.* 503, at special term, a different rule was adopted. As the will is not set out in the report, the accuracy of the opinion cannot be tested, though the case may have been, and probably was rightly decided. The reasons on which it is based by the learned judge cannot be supported by the cases, and were disapproved by the court of appeals in *Reynolds v. Reynolds*, *supra*, page 261.

of the testator as fail to exhibit their claims, according to the notice, will be driven to their action against the legatees or distributees to whom the estate has been paid over by the executor. As this remedy cannot be asserted in the surrogate's court, the further notice of it does not belong to this treatise.

SECTION VI.

Of the payment of the residue, and of the rights of the executor thereto, where there is no residuary legatee.

The residue, generally speaking, embraces not only what the testator did not attempt to dispose of, but every part of his property which, by lapse or otherwise, is not effectually bequeathed to others. (*King v. Strong*, 9 *Paige*, 94. *James v. James*, 4 *Paige*, 115. *Van Kleeck v. The Reformed Dutch Church*, 6 *Paige*, 600, *aff.* 20 *Wend.* 457. *Bowers v. Smith*, 10 *Paige*, 193. *Banks v. Phelan*, 4 *Barb.* 80.) If the residue be given to several *in common*, and the legacy of one lapses, or is revoked as to him, his share goes to the next of kin. (*Floyd v. Barker*, 1 *Paige*, 480. *Hart v. Marks*, 4 *Bradf.* 161.) It would be otherwise if bequeathed to several in *joint tenancy*. In such a case, the survivors would take the whole. (*Webster v. Webster*, 2 *P. Wms.* 347.)

It was a principle of the common law, from the earliest times, that the whole personal estate of the testator vested, at his death, in his executor. It followed, from this principle, that whatever was not effectually bequeathed to others, belonged, after the payment of debts, to the executor beneficially. (*Att'y Gen. v. Hooker* 2 *P. Wms.* 338.) The same rule originally prevailed, as well in equity as at law. But the court of chancery, at an early day, laid hold of the peculiar wordings of the will to find indications of a contrary intention of the testator; as, where a legacy was given to him for his care and trouble, or where he was appointed a trustee, and the like. That court struggled to convert the executor into a trustee of the unbequeathed surplus, for the benefit of the next of kin, and thus prevent his holding it for his own benefit.

The principles of equity finally triumphed, and became the law.

In this state, by the revised statutes, it is enacted that the surplus, *after paying debts and legacies*, shall be distributed to the widow and next of kin, in the manner therein stated, and as will be hereafter considered. (2 R. S. 96, § 75.) Hence, the executor, in every instance, becomes a trustee for the widow and next of kin, of the unbequeathed surplus. He takes nothing beneficially, unless named as a legatee. This makes the executor a mere officer, nominated by the testator, and appointed by the court to execute the trusts in the will, and to discharge, out of the effects of the deceased, the claims which individuals may have against the testator in his lifetime. The personal property, money and choses in action, and chattels of all kinds, are still devolved upon him; but he takes them in a representative capacity. He holds the estate in trust for the various purposes of the law. His first duty, therefore, is to pay the funeral charges and debts of the deceased; then the specific and general legacies, if there be assets; and then to distribute the remainder, if it be not bequeathed, to the persons entitled to it under the statute of distributions.

SECTION VII.

Of distribution, and of the duties of an executor or administrator with respect thereto.

Whatever may have been the ancient right of the executor or administrator to the personal estate of deceased persons, it has not been doubted, that since the statute of distributions of 22 and 23 Charles 2, it is their duty, after paying the funeral charges and debts, to distribute the remainder to the legatees according to the will, and the balance undisposed of to the persons contemplated by the statute, as in cases of intestacy. The statute of Charles 2 forms the basis of the legislation of this state, and probably of most of the others on this subject. It is said to have been borrowed from the 118th novel of Justinian, and except in some few instances mentioned therein, to be governed and construed by the rules of the civil law.* (2 Kent's Com. 422.)

* The cases arising under the English statute of distributions are reviewed by Mr. Justice Williams in his treatise on the law of executors, &c., 2 vol. 1271 et seq., and an elaborate note in the last American edition, has laid before us most

The existing law of this state makes the following provisions on the subject now under consideration. To render our subsequent remarks intelligible, it will be necessary to insert the enactment verbatim. (2 *R. S.* 96, § 75.)

“Where the deceased shall have died intestate, the surplus of his personal estate remaining after payment of debts; and where the deceased left a will, the surplus remaining after the payment of debts and legacies, if not bequeathed, shall be distributed to the widow, children or next of kin of the deceased, in manner following :

“1. One-third part thereof to the widow, and all the residue by equal portions among the children, and such persons as legally represent such children, if any of them shall have died before the deceased :

“2. If there be no children, nor any legal representatives of them, then one moiety of the whole surplus shall be allotted to the widow, and the other moiety shall be distributed to the next of kin of the deceased, entitled under the provisions of this section :

“3. If the deceased leave a widow and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to a moiety of the surplus as above provided, and to the whole of the residue where it does not exceed two thousand dollars; if the residue exceed that sum, she shall receive, in addition to her moiety, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives :

“4. If there be no widow, then the whole surplus shall be distributed equally to and among the children, and such as legally represent them :

“5. If there be no widow and no children, and no representatives of a child, then the whole surplus shall be distributed to the next of kin, in equal degree to the deceased and the legal representatives :

“6. If the deceased shall leave no children and no representa-

of the American cases on the same subject. My examination of the subject is mainly confined to so much of the law of this state, as is usually administered in surrogates' courts.

tives of them, and no father, and shall leave a widow and a mother, the moiety not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters ; and if there be no widow, the whole surplus shall be distributed in like manner to the mother and to the brothers and sisters, or the representatives of such brothers and sisters :

“7. If the deceased leave a father and no child or descendant, the father shall take a moiety, if there be a widow, and the whole, if there be no widow :

“8. If the deceased leave a mother and no child, descendant, father, brother, or sister, or representative of a brother or sister, the mother, if there be a widow, shall take a moiety ; and the whole, if there be no widow. And if the deceased shall have been an illegitimate and have left a mother and no child or descendant or widow, such mother shall take the whole, and shall be entitled to letters of administration in exclusion of all other persons, in pursuance of the provisions of this chapter. And if the mother of such deceased shall be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order : (*As amended in 1845, ch. 236.*)

“9. Where the descendants or next of kin of the deceased, entitled to share in his estate, shall be all in equal degree to the deceased, their shares shall be equal :

“10. When such descendants or next of kin shall be of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks ; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled :

“11. No representation shall be admitted among collaterals, after brothers' and sisters' children :

“12. Relatives of the half blood shall take equally with those of the whole blood in the same degree ; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood :

"13. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him."

The doctrine of advancement is intimately connected with that of distribution, and is thus provided for in the four sections following the above 75th :

"If any child of such deceased person shall have been advanced by the deceased, by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children ; and if such advancement be equal or superior to the amount, which, according to the preceding rules, would be distributed to such child, as his share of such surplus and advancement, then such child and his descendants shall be excluded from any share in the distribution of such surplus.

"But if such advancement be not equal to such amount, such child or his descendants, shall be entitled to receive so much only as shall be sufficient to make all the shares of all the children in such surplus and advancement to be equal as near as can be estimated.

"The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement within the meaning of the two last sections ; nor shall those sections apply in any case where there shall be any real estate of the intestate to descend to his heirs. (*See 1 R. S. 754, providing for such cases.*)

"The preceding provisions respecting the distribution of estates shall not apply to the personal estates of married women ; but their husbands may demand, recover and enjoy the same as they are entitled by the rules of the common law."

The foregoing 75th section was taken from the former statute of distributions, which was copied from the English statutes on the same subject. (*1 R. L. of 1813, pp. 313, 314.*) In the present statute the word "deceased" is substituted for "intestate," but it is not supposed that any different rule of construction was intended to be introduced by this change of phraseology. The meaning is the same in both cases.

Numerous questions may arise under the statute of distributions

with respect to the right of the husband to the personal estate of his wife. The statute expressly reserves the common law right of the husband to administer on her estate to his own benefit. That right has been regulated by another provision of the law, elsewhere noticed, whereby the husband becomes liable for her debts to the extent of the assets received by him, (2 *R. S.* 75, §§ 29, 30,) and beyond that is entitled to the property absolutely. (*Shumway v. Cooper*, 16 *Barb.* 556.)

The act for the more effectual protection of the property of married women, passed in 1848 and amended in 1849, (*L. of* 1848, *p.* 307; *L. of* 1849, *p.* 528,) merely allows any married female to take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried; and the same are not subject to the disposal of the husband nor liable for his debts. But the statute is silent as to the disposition of her property, in case she dies intestate. It is left in such a case to be governed by the rules which previously prevailed with respect to the personal estate of a deceased married female. If her husband survives her, he takes as administrator to his own use, subject to her debts, what she has not effectually bequeathed. (*McCosker v. Golden*, 1 *Bradf.* 64. *Shumway v. Cooper*, *supra*.)

By renouncing administration, a widow, or any other person interested, does not relinquish any right to a distributive share of the estate of the deceased. But the title of a widow, under the statute, may be barred by a marriage settlement, before marriage, excluding her from her distributive share of her husband's personal estate. (*Clancy's Rights of Women*, 510 *et seq.*)

Questions arising out of the law of marriage and divorce may sometimes incidentally arise before the surrogate, on decreeing distribution, but the reader is referred to treatises on this subject. (*See Wait v. Wait*, 4 *Comst.* 95. *Burr v. Burr*, 10 *Paige*, 25, *affirmed* 7 *Hill*, 207.)

With regard to the rights of children and their representatives, and the doctrine of advancement, a few words will be added.

Persons are said to take *per capita* when they take in their own right. When all the next of kin are of the same degree of kindred to the deceased, they take equal shares *per capita*. Thus, if the father have three children, John, Henry and Sarah, and they all die before their father, John leaving one child, Henry two, and Sarah four, and afterwards the father dies intestate; in that case all his grandchildren shall have an equal share; for as his children are all dead, their children take as next of kin *per capita*, and not by representation. In the case supposed, the seven grandchildren will each take a one-seventh part.

Persons are said to take *per stirpes* when they take not in their own right but by representation. Thus, if the father have three children, John, Henry and Sarah, and John dies leaving two children, Henry dies leaving three children, and Sarah alone survives her father, who dies intestate; in this case, Sarah takes in her own right *per capita*, one-third; the three children of Henry *per stirpes*, as representing the stock of their father, another third; and the two children of John, in like manner, the remaining third.

This right of representation extends, by the statute, no further than to brothers' and sisters' children. Thus, we will suppose John, Henry and Sarah to be the three children of the intestate. John dies in the lifetime of his father, leaving two children; Henry dies in his father's lifetime, leaving two children and four grandchildren, the offspring of a deceased son. The ancestor at length dies intestate, his daughter Sarah having survived him. In this case, therefore, Sarah in her own right takes one-third of the personal estate of her father; the two children of John, in right of their father, take another third; and the two children of Henry, in right of their father, the remaining third. The grandchildren of Henry, being the offspring of his deceased son, take nothing. Their father, had he lived, would have been entitled to one-third of the share belonging to his father Henry by representation, but they, being one degree further removed, cannot make out their kindred except through a double representation. They are of kin to the intestate, indeed, but not *next of kin*, nor within the class of representation contemplated by the statute. Their relationship to Sarah, the nearest of kin, is that of brother's *grandchildren*. The father of one is the great grandfather of the other.

Sarah is their great aunt. Nor would the result have been altered, as to Henry's grandchildren, had Sarah also died in the lifetime of her father, either with or without children.

An advancement is not fraudulent as to creditors if the parent, in good faith, retain in his own hands property sufficient to pay all his debts. (*Van Wyck v. Seward*, 6 Paige, 62; affirmed, 18 Wend. 375.)

In England it is said that the provision of the statute of distributions as to advancement applies only to the distribution of the estates of intestate fathers, and, therefore, an advancement by a mother, being a widow, shall not be brought into hotchpot. (*Wm's Exrs.* 1286, citing *Holt v. Frederick*, 2 P. Wms. 357.) The reason of this, as assigned by Lord Ch. King, is, that the statute of distributions was grounded on the custom of London, which never affected a widow's personal estate, and that the act seemed only to include those within the clause of hotchpot, who are capable of having a wife as well as children. The reason for this distinction is not applicable to our statute. If it is construed with the corresponding statute relative to advancement of real property, as it should be, no reason is perceived why, under our statute, an advancement made by the widowed mother to one of her children, should not be brought into hotchpot as well as when made by the father. (1 R. S. 754.)

The principle on which the law relative to advancements rests does not require that any thing should be taken from the child who has thus been the object of his parent's bounty. He is entitled to hold what he has got; but when he comes, on the death of his parent, to ask a portion of the remainder of the estate, it is required, by the clearest principles of equity, that what he has already received as an intended advancement, should be brought into hotchpot. If that be equal to, or greater than the shares which fall to the other children, he will be entitled to no more, though not required to refund any thing. If it falls short of his portion, he receives from the estate enough more to make him equal with the rest. (*Edwards v. Freeman*, 2 P. Wms. 443.)

It was said by Sir Wm. Grant, in *Walton v. Walton*, 14 Ves. 324, that the provision in the statute of distributions applies only

to the case of *actual intestacy*; and where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, yet they take as if the residue had been actually given to them. Therefore the child, advanced by his father in his lifetime, could not be called to bring his share into *hotchpot*. There is nothing in our statute which would lead to a different result. A testator may dispose of his property as he pleases. If he makes an unequal distribution of his estate among his children by his will, and dies possessed of property not disposed of, such unbequeathed estate must be distributed equally, without reference to the mode in which he has made his will.

There are several contingencies in the statute, on the happening of which the whole or some portion of the estate must be distributed to the next of kin of the deceased. To ascertain who these next of kin are, we are governed by the same rules of consanguinity as those which determine the right of administration in cases of intestacy. (2 *Bl. Com.* 515. *Toller*, 381. 2 *Burn's E. L.*, quarto ed. 713, title *Wills, Distribution*. *Hurtin v. Proal*, 3 *Bradf.* 414.) It matters not how distant they are from the common ancestor, whether children, grandchildren, or great grandchildren, or whether they are in the ascending or descending line.

The party, to be entitled, must be of kin. By this is meant a relationship by blood, and not merely the conventional relationship created by intermarriage. Hence the mother-in-law or step-mother of an intestate, not being of his blood, can claim nothing under the statute of distributions. Nor, upon the same principle, can a brother-in-law or sister-in-law.

The object of the statute is to make an equal distribution among those of the same degree of kindred to the intestate, except where a different rule is prescribed. In computing the propinquity of kindred we are governed by the rules of the civil law, by which the intestate himself is the *terminus a quo*, the several degrees are numbered. Under that rule the father stands in the first degree, the grandfather and grandson in the second; and in the collateral line the computation is from the intestate to the common ancestor of the intestate and the person whose relationship is sought after,

and then down to that person. According to that rule the intestate and his brother are related in the second degree, the intestate and his uncle in the third degree. (2 *Kent's Com.* 422, *Burds' E. L. supra.*)

The father succeeds to the whole personal estate of his son who dies intestate, leaving no widow or descendants, in exclusion of the brothers and sisters. The mother would also have succeeded as against the collaterals, but for a saving clause, which excludes her from all but a ratable share. The object of her exclusion was, to prevent her from transmitting the whole estate, in case of a re-marriage, into another line, in entire exclusion of the brothers and sisters; but she still takes the whole personal estate in exclusion of more remote relations of the intestate. In the case of an illegitimate dying intestate and unmarried, there was formerly an absolute obstruction of the course of succession; such person could transmit to his lineal descendants, but not to his ancestors or collateral relatives. (*The Public Adm'r v. Hughes*, 1 *Bradf.* 125.) But in this state, by the *act of 1845, p. 257, amending the 8th subdivision of the 75th section*, and which is cited at large in a preceding page, the mother of an illegitimate, who dies leaving no child, or descendant, or widow, takes the whole personal estate, and is entitled to letters of administration, in exclusion of all other persons. And if such mother be dead, the relatives of the deceased, on the part of the mother, take in the same manner as if the deceased had been legitimate, and are entitled to letters of administration in the same order.

In successions to personal estate, relatives of the half blood, in equal degrees of cognation to the intestate, take equally with relatives of the whole blood; and they also take by representation, where representation would be allowed among relatives of the whole blood. (*Hallet v. Hare*, 5 *Paige*, 315.)

The grandmother is preferred to the aunt, not because she is in the ascending line, but because she is nearer of kin, according to the computation of the civilians, by one degree.

The 9th subdivision of the 75th section, it has been seen, provides that where the descendants, or next of kin of the deceased entitled to share in his estate, shall be all in equal degree to the deceased, their shares shall be equal. The English statute con-

tains the same provision. A brother of the intestate and a grandfather of the intestate are equally near of kin, and each is related in the second degree. By a literal construction of the act, their shares of the intestate's personal estate would be equal. But it has been held in England, for more than a century before the adoption of our revised statutes, that the brother of the intestate will exclude the grandfather of the intestate; and this, Chancellor Kent thinks, is the better construction of the 118th novel of Justinian. (*Evelyn v. Evelyn*, 3 *Atk.* 762, 764. *S. C.*, *Ambler*, 191, and cases there cited.) According to the principle which usually prevails, where a statute of the mother country had received a uniform construction before it was adopted here, it retains the construction thus given to it, unless there is some plain and unequivocal indication of a contrary intention in the adopting act. This construction of the act may be considered as an exception to the general rule, founded on motives of convenience and policy.

A grandfather will exclude an uncle or aunt, as being one degree nearer of kin. A great grandfather is entitled to an equal distributive share with an uncle or aunt, both being within the same degree. (*Blackborough v. Davis*, 1 *Salk.* 38. *S. C.*, 1 *P. Wms.* 41.)

In the discussion of the subject, we have hitherto taken for granted that the person whose estate was the subject of distribution was domiciled in this state. If such were not the fact; if his residence here was merely temporary or casual, and his permanent domicile under another jurisdiction, a different rule prevails. It was well remarked by the learned surrogate of New York, in *The Public Administrator v. Hughes*, 1 *Bradf.* 130, that it has become a settled principle among civilized nations, to substitute for the domestic rule of distribution the law of distribution which prevails in the country where the deceased was domiciled at the time of his death. On this principle, in *Burr v. Sherwood*, 3 *Bradf.* 85, a question arose between the administrator of a married woman and the administrator of her deceased husband as to the rule of distribution; and it was held to be according to the law of Connecticut, where the parties were married and domiciled at the time of their death. In *Churchill v. Prescott*, *Id.* 233, the distribution was directed to be made according to the law of New Hampshire,

where the deceased was domiciled when he died. In *Graham v. The Public Administrator*, 4 *id.* 127, the distribution of the estate of the intestate, who died at the marine hospital in New York, was made according to the law of Scotland, being her last domicile.

The rule, as settled in England and by the general usage of nations, as to real and personal property, has repeatedly been declared to constitute a part of the municipal jurisprudence of this country. The rights to personal property are regulated by the laws of the country where the deceased lived; but the suits to enforce those rights must be governed by the laws of that country in which the tribunal is placed. (*Dixon's Ex. v. Ramsey's Ex.*, 3 *Cranch*, 319.)

There is no difficulty in the principle; the only embarrassment which arises is as to the facts which constitute domicile in a particular case. It is well settled that every person must have a domicile some where. A domicile can only be acquired by residence with the intention of remaining at the new place of abode. *Intention* alone is not sufficient; the new domicile must be established *animo et facto*, by a union of the fact and intention. (*Graham v. The Public Administrator*, 4 *Bradf.* 127. *Story's Conflict of Laws*, § 41, *ch.* 3.)

There is no fixed or definite period of time requisite to create a domicile. The residence to create it may be short or long, according to circumstances. It depends on the actual or presumed intention of the party. A person being in a place is *prima facie* evidence that he is domiciled there; but it may be explained and the presumption rebutted. The place where a man carries on his established business, or professional occupation, and has a home and residence, is his domicile, and he has all the privileges, and is bound by all the duties flowing therefrom. Though his family reside part of the year at another place, such place is regarded only as a temporary residence, and the home and domicile for business takes away the character of domicile from the other. The original domicile of the party always continues till he has fairly changed it for another; and if a party has two temporary domicils, and a residence in each alternately of equal portions of time, the rule is, that the place where the party's business lies should

be considered his domicile. (*See note, 2 Wms. Ex. 1303. 2 Kent's Com. 429 et seq. Andrews v. Herriot, 4 Cowen, 516 et seq., note of Judge Cowen, where the cases are collected and examined.*)

With regard to the application of the rule, the doctrine is that the place of domicile is the place of the principal administration, and with reference to which the distribution amongst the next of kin or legatees is made. (*Churchill v. Prescott, 3 Bradf. 233.*) But a foreign executor or administrator cannot sue in our courts without obtaining letters testamentary, or of administration, auxiliary to the grant abroad. (*Morrell v. Dickey, 1 J. Ch. R. 153. McNamara v. Dwyer, 7 Paige, 239.*) If a foreign executor or administrator desires to reach funds in this state through the instrumentality of our courts, letters should be granted by the surrogate auxiliary to the main grant, and the person so appointed should remit the funds collected by him to the principal executor or administrator, to be distributed according to the law of the domicile of the deceased. But before remitting such funds he is bound first to apply the assets found here to pay debts due to our own citizens. (*Churchill v. Prescott, supra. Dawes v. Head, 3 Pick. 128.*)

If a foreign executor brings assets into this state, it was held by the chancellor in *McNamara v. Dwyer, supra*, that he could be compelled to account in a court of equity here for the trust funds, at the suit of creditors in this state, without taking out letters of administration on the estate of the deceased.

In concluding this section, it remains to speak of the payment of the distributive share, the persons entitled to receive it, and the time when it is payable.

The statute of distributions may be considered as the last will and testament of every person dying intestate in whole or in part, made for the benefit of his widow and next of kin, by the legislature. The right to it vests on the death of the intestate, and should the person entitled die before distribution made, his distributive share will vest in his personal representatives, to be distributed to his next of kin.

It is as important for an executor or administrator to ascertain the true person authorized to receive a distributive share of the

estate of the deceased, as it is in the case of a legacy. A payment to a person not entitled to receive it, although *bona fide*, will be no protection against the claim of the rightful party.

The general rule is, that the distributive share of the estate of the deceased is not due to the next of kin, or widow, from the executor or administrator, until one year from the date of the letters testamentary, or of administration, (2 *R. S.* 116, § 18;) and a general account of administration cannot be enforced until after the expiration of eighteen months from the same period. (2 *R. S.* 92, § 52 *et seq.*)

But there are cases where payment may be decreed at an earlier day. Thus, by the 82d section, (2 *R. S.* 98,) any person entitled to any legacy or distributive share of the estate of the deceased person, at any time previous to the expiration of one year from the granting of letters testamentary, or of administration, is authorized to apply to the surrogate, either in person or by guardian, after giving reasonable notice to the executor or administrator, to be allowed to receive such portion of such legacy or share as may be necessary for his support. (*Seymour v. Butler*, 3 *Bradf.* 193.) The 83d section provides that if it appears that there is at least one-third more of assets in the hands of such executor or administrator than will be sufficient to pay all debts, legacies and claims against the estate, then known, he may in his discretion allow such portion of the legacy or distributive share to be advanced as may be necessary for the support of the person entitled thereto, upon satisfactory bonds being executed for the return of such portion, with interest, whenever required. This provision, however, is not applicable to the public administrator in the city of New York.

When a distributive share is to be paid to a minor, the surrogate may direct the same to be paid to the general guardian of such minor, and to be applied to his support and education, or he may direct the same to be invested in permanent securities, as provided in the case of legacies to minors, with the like authority to apply the interest, and subject to the same obligations. (2 *R. S.* 98, § 80.)

The observations made in the 4th section of this chapter, on the subject of paying legacies to minors, and the practice there indi-

cated, are applicable to this branch of the subject. (See *ante*, page 383 *et seq.*)

The mode of proceeding under the 82d and 83d sections, to obtain a portion of a legacy or of a distributive share for the support of an infant, is summary. The executor or administrator, on receiving notice of the application, should prepare an account of his administration, as far as he can then ascertain it, and of the assets ; which account should be exhibited to the surrogate, under oath, and left with him as a part of the papers in the cause. The order for the allowance or the refusal should be entered in the minutes, but it is conceived to be the best practice to transcribe the account, after putting it in proper form, if it was not already so, in the book for keeping the accounts of executors and administrators. The expense of the application ought not, in general, to be borne by the fund belonging to the infant ; nor should the motion be resisted, if it appears that at least one third more of assets are in the hands of the executors or administrators than sufficient to pay all debts, legacies and claims against the estate. In such a case the executor or administrator should make the advance to the legatee or party in distribution, in anticipation of a final settlement. Indeed, in many cases, such advances can be safely made, without exacting a bond for refunding. The bond being for the benefit of the executor or administrator, may be dispensed with by him.

At any time after one year shall have elapsed from the date of the letters testamentary or of administration, payment of a distributive share may be decreed by the surrogate, upon the application of a relative entitled thereto. (2 *R. S.* 116, § 18.) No bond is required from the next of kin to the executor or administrator, to refund in this case. If the executor or administrator has pursued the steps pointed out by law, he will, after the expiration of the year from the date of his letters, be possessed, in general, of a knowledge of the extent of the assets, and of the claims against the estate. If he has failed to acquire such knowledge, the next of kin ought not to be prejudiced or delayed by his negligence or fraud.

It is the duty of the executor or administrator, as soon after the year from the date of his letters as is practicable, without being cited by the surrogate for that purpose, to pay over the surplus of

the estate, after payment of debts and charges, to the parties entitled thereto. The statute contemplates that six months will be long enough for this purpose. Hence, after the lapse of eighteen months from the date of the letters testamentary or of administration, the executor or administrator, either on the application of a person interested as creditor, legatee or next of kin, or upon his own application, may render a final account of his administration to the surrogate by whom he was appointed. (2 R. S. 92 *et seq.*)

We shall treat of the practice in rendering such account in a subsequent chapter.

The practice formerly was for the executor or administrator to require a bond to refund in all cases of the payment of distributive shares. This doctrine was fully discussed by Chancellor Kent, in *Genet v. Tulmadge*, (1 John. Ch. 3,) and it was to obviate the inconvenience and frequent injustice of that practice, that the foregoing provisions were introduced into the revised statutes. (See *Revisers' Notes.*) An executor or administrator who conducts his business agreeably to the directions of the statute, may, at the end of eighteen months from his appointment, obtain a final settlement of his administration and be discharged from all future responsibility.

CHAPTER V.

OF ENFORCING THE PAYMENT OF LEGACIES AND DISTRIBUTIVE SHARES IN SURROGATES' COURTS, AND HEREIN OF COMPELLING AND RENDERING FINAL ACCOUNTS.

We have in a preceding chapter treated of the mode of enforcing the payment of judgments, by proceedings in surrogates' courts, and have discussed, to some extent, the subjects of legacy and distribution. We come now to consider the mode of enforcing the payment of legacies and distributive shares of the estates of deceased persons. And we shall close this branch of our subject by pointing out the practice in rendering and settling the final accounts of executors and administrators, in surrogates' courts.

SECTION I.

Of the mode of enforcing the payment of legacies and distributive shares.

We have shown in a previous chapter, that there are two instances where payment of a legacy may be decreed within a year from the date of the letters testamentary or of administration; 1. Where the legacy is directed by the will to be sooner paid, (2 *R. S.* 90, § 44,) and 2. Where the payment of the whole or a part of a legacy or distributive share is necessary for the support of the applicant. (2 *R. S.* 98, § 82.) The first embraces legacies only; the second comprises legacies, or distributive shares. The authority thus to anticipate the time of payment is not exclusively to be exercised in favor of infants, but applies to adults also. (*Seymour v. Butler*, 3 *Bradf.* 193.)

The mode of proceeding is as follows: 1. In case the will directs a legacy to be paid within a year, the executor or administrator is authorized to require a bond with two sufficient sureties, conditioned, that if any debts against the deceased shall duly appear, and which there shall be no other assets to pay, and there shall be no other assets to pay other legacies, or not sufficient, that then the legatee shall refund the legacy so paid, or such ratable proportion thereof with the other legatees, as may be necessary for the payment of the said debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee; and that if the probate of the will under which such legacy is paid, shall be revoked or the will declared void, then that such legatee shall refund the whole of such legacy, with interest, to the executor or administrator entitled thereto. (2 *R. S.* 90, § 44.)

An executor or administrator cannot be deemed to be in default for not paying a legacy within the year, unless the bond above prescribed is tendered to him duly executed and acknowledged. He may, indeed, on receiving such bond voluntarily make the payment; but if he declines to do so, the legatee, in order to obtain a decree in his favor for the legacy, should present a petition to the

court, briefly stating the facts entitling him to payment, and praying for an order for that purpose. It should be duly verified, and on filing it, an order should be entered in the minutes, that a summons issue to the executor or administrator, as in the case of proceedings to compel the return of an inventory.

The executor or administrator may answer the petition, either by the denial of the facts set forth in it, or by setting up other facts in avoidance. It is presumed that a deficiency of assets to pay debts, if discovered before the application, would be a good bar to a decree for the legacy notwithstanding the bond. Debts, it has already been shown, claim a priority over legacies. The bond is required in the case under consideration, because payment of the legacy may be exacted before the condition of the assets is known. It is not only for the indemnity of the executor or administrator, but for the security of the legatees and parties in distribution.

If the surrogate makes a decree, it may be enforced in the manner above suggested, or by a suit on the bond of the executor or administrator whenever directed by the surrogate. (2 *R. S.* 91, § 45.)

2. Where the whole or a part of a legacy or a distributive share is wanted before the expiration of the year from the date of the letters testamentary or of administration, for the support of the party entitled to such legacy, or share, although the time of payment of the legacy has not arrived by the terms of the will, such party may, either in person, or if a minor, by his guardian, apply to the surrogate of the proper county, to be allowed to receive such portion of such legacy or share as may be necessary for his support. A reasonable notice of the application must be given to the executors or administrators. As the statute is silent as to the time of notice, the surrogate must determine what is a reasonable notice, from a view of the whole case. On the appearance of the parties, the surrogate should examine into the condition of the estate, in a summary way, and if there is at least one third more of assets in the hands of the executor or administrator than will be sufficient to pay all debts, legacies and claims against the estate then known, he may in his discretion allow such portion of the legacy or distributive share to be advanced as may be necessary for the support of the person entitled thereto, upon satisfactory bonds being ex-

accounted for the return of such portion, with interest, whenever required. (2 *R. S.* 98, §§ 82, 83.)

From what has been said it would seem that the surrogate must act upon the account rendered by the executor or administrator under oath, unless the petitioner is able to impeach it. The surrogate has a reasonable discretion to exercise on this application.

In the foregoing cases the application may be made at any time after the date of the letters testamentary or of administration. There is still another class of cases where the application cannot be made until after one year from the date of the letters, and yet may be made before the eighteen months from that time. This is provided for by the 18th section, (2 *R. S.* 116,) which gives the surrogate of the proper county jurisdiction to decree the payment of debts, legacies, and distributive shares, or the just proportional part, at any time after one year shall have elapsed, from the granting of such letters, upon the application of a creditor, legatee or party entitled to such distributive share. In this stage of the administration of the estate no bail is required of the creditor, legatee or distributee to refund. The decree of the surrogate will be a complete protection to the executor or administrator to make the payment directed.

The mode of the application is by petition, as in the former cases. The proceeding cannot be the basis of a final account. As no parties are brought before the court but the executors or administrators, the surrogate should be cautious, and not decree in favor of the applicant more than will be, on a final settlement of the estate, the just share of the petitioner. Where the solvency of the estate is doubtful, or from its complicated nature it cannot be brought to a close in one year, it would seem the surrogate has a discretion whether to decree payment or not. (*Flagg v. Ruden*, 1 *Bradf.* 193.)

The foregoing cases are not of frequent occurrence. It is not until the eighteen months have elapsed from the date of the letters testamentary or of administration that an executor or administrator can be required to render an account of his proceedings by an order of the surrogate. This order can be granted upon application from some person having a demand against the personal

estate of the deceased, either as creditor, legatee or next of kin ; or of some person in behalf of any minor having such claim ; or without such application. (2 *R. S.* 92, § 52.) And by the section as amended in 1859, in the case of an administrator, the account can be required upon the application of any person who is or has been his bail, or of the legal representatives of such person. (*Law of 1859, page 569, ch. 261, § 1.*)

It is said by the chancellor that before the revolution surrogates had no jurisdiction to compel *executors* to render an account of their administration, but that they were confined to *administrators*. (*Foster v. Wilbur, 1 Paige, 540.*) The power was extended to executors in 1787, and at the present time the jurisdiction over both is firmly established. It is well settled also that the surrogate can, *of his own motion*, compel executors and administrators, after the expiration of eighteen months from their appointment, to render an account of their administration. (*Thompson v. Thompson, 1 Bradf. 24. Westervelt v. Gregg, 1 Barb. Ch. R. 469.*) In such a case, after examining the executor or administrator upon oath touching the account, and filing the account and vouchers, the proceeding is thereupon terminated, and the surrogate cannot proceed to settle the account. (*Id.*)

It is only where a party having some interest in the estate as creditor, legatee or next of kin invokes the aid of the court, that a decree can be made for the payment of a debt, a legacy or distributive share. The surrogate cannot, *on his own motion*, direct such payment. It is on the motion of the claimant alone, that a decree can be made in his favor ; and it is on the motion of the executor or administrator alone, that the accounts of the estate can be finally settled. (2 *R. S.* 93, § 60. *Stone v. Morgau, 10 Paige, 615. Bronson v. Ward, 3 id. 189. Westervelt v. Gregg, 1 Barb. Ch. R. 478. Gratacap v. Phylfe, id. 485.*)

It was remarked by Sir John Nicholl, in *Grignon v. Grignon*, (1 *Hagg. 535, 3 E. E. R. 239*), that the original jurisdiction in cases of legacy, to enforce payment and to compel executors to perform their duty, was in the ecclesiastical courts. Temporal courts, however, interfered by injunction or prohibition where those courts were already in possession of the cause, or where the powers of the ecclesiastical judges were defective or insufficient, but not where

no trust was existing, beyond the mere trust of executorship, which remained to be executed. Indeed, the jurisdiction of the ecclesiastical courts, in compelling payment of personal legacies, is older than that of the court of chancery; and it was only upon the notion of a trust that equity originally assumed jurisdiction in these matters.

The course of proceeding in the Arches court is said to have been as follows: The executor being cited to answer the legatee in a suit of substraction of legacy, a short libel is brought in, pleading that the testator made his will; that he appointed C. D. executor thereof; that he is since dead without revoking his will; that since his death the executor has proved the will in the proper court; that by his will the testator left a legacy to E. F., in the following terms, (setting it forth;) that the legacy remains unsatisfied; that the executor is possessed of and has admitted assets; has been applied to and refused payment; that the promoter is the identical legatee and is of full age; and concludes with a prayer that the executor may be compelled to pay the legacy and be condemned in costs. (*Butler v. Robson*, 3 *Phill.* 412. 2 *Wms. Ex'rs*, 1780.) In *Foster v. Wilbur*, 1 *Paige*, 540, the executors were cited to render an account before the surrogate, and on the return of the citation, they called upon the promoters to state the grounds of their claim against the executors; but it was not done. On this branch of the case, the chancellor said "it was their duty, when called on for that purpose, to file a written allegation or libel, propounding or stating the substance of their claim against the defendants respectively, and the nature and grounds thereof. If this allegation was insufficient, and showed no grounds for proceeding against the executors, the court might be called upon to reject it; or they might take issue on the facts propounded; or put in a counter allegation in the nature of a plea in bar. Until some issue was joined in the cause, neither party could be prepared to go into the examination of testimony."

The course suggested by the chancellor may be a proper one in a case like the one before him, where the citation had been issued on a verbal application, *ore tenus*. It is not, however, the usual practice in surrogates' courts at this day.

The mode of procedure generally adopted is for the claimant to present a petition, in writing, to the surrogate, setting forth the

rights of the petitioner as creditor, legatee or distributee, and the circumstances which create the liability of the executor or administrator, and praying for the appropriate relief against the executor or administrators. It should be verified by affidavit.

The order granted on the filing of the petition, will be an alternative order, according to the prayer of the petition, requiring the executors or administrators to account and satisfy the claim, or show cause, on a day to be appointed, to the contrary. The order must be served on the executor or administrator by showing the original, and at the same time delivering a copy, or in case of his absence from home, by leaving a copy thereof with his wife, or some suitable person, at the place of his residence, thirty days at least before the time of hearing.

If the executor or administrator does not reside within this state, the order must be served by publishing it once in each week for three months before the return day thereof, in the state paper, and also in the county paper where the surrogate resides who issued the order, if any such paper is then published in said county, and if not, in the county paper of some adjoining county, unless the order be personally served on such executor or administrator, and if it shall be so personally served on any such executor or administrator residing out of the state, at the time of service, such service shall be made at least sixty days before the return thereof. (*L. of 1837, ch. 460, § 76. 3 R. S. 178, 5th ed.*)

By the 53d section (2 *R. S.* 92,) it is enacted that obedience to this order may be enforced in the manner before directed, to compel the return of an inventory; and in case of disobedience, the same proceedings may be had to attach the party so disobeying, and to discharge him. And the like revocation of the letters granted to him may be made in case of the party's absconding or concealing himself, so that the order cannot be personally served, or of his neglecting to render an account within thirty days after being committed; and new letters shall be granted with the like effect as in those cases. (For these proceedings see ante, p. 363.)

On the return day of the order, if the claimant fails to appear, the petition will be dismissed, unless cause be shown to the contrary. If the claimant appears and the executor or administrator, having been duly notified, either by a personal service or by pub-

lication, as the case may be, he may proceed *ex parte* to establish his right to the relief sought.

If the claimant has asked for no other relief but an account, the executors or administrators will be entitled to be dismissed, on complying with the order, and rendering the account. (*Campbell v. Bruen*, 1 *Bradf.* 224. *Westervelt v. Gregg*, *supra*. *Smith v. Van Keuren*, 2 *Barb. Ch.* 473.)

But the petition usually prays for the payment of a debt, a legacy or distributive share, and the calling for an account is only subsidiary to that relief. The parties on both sides generally appear on the return of the order.

In case both parties appear, and the claim is not disputed by the executors or administrators, nor a deficiency of assets pretended, an order will be made by the surrogate directing the payment of the sum allowed by the surrogate. The payment of that amount will terminate that proceeding. (*Id.*)

But various questions may arise before the surrogate, on the appearance of the parties on the return of the order.

1. If the claimant has omitted to state the facts necessary to entitle him to relief, in his petition, he may, in this stage of the cause, be required by the executors or administrators to set forth in the form of an allegation or libel, as was suggested by the chancellor in *Foster v. Wilbur*, *supra*, a full statement of the facts which constitute his claim and his right to relief; and on his failing to do so, the petition may be dismissed. But if the petition has been properly drawn and contains all the averments necessary to give the court jurisdiction and entitle the claimant to the relief prayed for, it is believed that no further pleading on his part is necessary.

The claim may be resisted on the part of the executors or administrators, by controverting any of the material averments of the petition. It may be shown that the claimant has no interest in the estate, as legatee or next of kin; that the debt which he sets up has been barred by the statute of limitations, or is barred by a release or otherwise. (*Gratacap v. Phyfe*, 1 *Barb. Ch. R.* 486.) He may also show that the debt has been disputed by the executors or administrators, and not referred as allowed by the act, or prosecuted to judgment. It is not believed that a creditor

at large, whose pretended debt is not assented to by the executors or administrators, but on the contrary contested by them, can institute an action before the surrogate to recover it in this way. (*Dissosway v. The Bank of Washington*, 24 Barb. 60. *Chandes v. Northup*, Id. 129. *Francisco v. Fitch*, 25 id. 130. *Wilcox v. Smith*, 26 id. 316.) The cases of *Campbell v. Bruen*, 1 Bradf. 225, and *Babcock v. Lillis*, 4 id. 218, are not in conflict with this position. If a demand against the deceased be presented to the executors or administrators, with the vouchers thereof, and be assented to by them, whether it was a mere equitable claim, or an unliquidated demand before such presentation, it can no doubt be allowed by the surrogate, and ordered to be paid. If it be not assented to, but on the contrary contested, the claimant must have it liquidated by a judgment in a court of law, either on a trial or by a reference, before he can rightfully invoke the aid of the surrogate in the premises.

On the same principle the claim for a distributive share may be resisted on the ground that the applicant is not one of the next of kin within the meaning of the statute of distributions; or that he has received his share by way of advancement; or if the claim be for a legacy, that there are no assets applicable to the payment of it, or that it was satisfied by the testator in his lifetime; or if it be a specific legacy, that it has been adeemed by the destruction of its subject in the lifetime of the testator. So, also, the question as to whether there has been a *donatio mortis causa* sometimes arises on taking an account. A *donatio mortis causa* partakes of the nature of a legacy and of a gift *inter vivos*. The gift must be with a view to the testator's death; it must be conditioned to take effect on the death of the donor by his existing disorder; and it must be accompanied by an actual delivery of the subject of the donation. (*Craig v. Craig*, 3 Barb. Ch. R. 76. *Harris v. Clark*, 3 Comst. 93. *Willard's Eq. Juris.*, 553 *et seq.*)

2. It follows, from what has been said, that the executors or administrators may, in answer to the claim, show either that no assets of the deceased ever came to their hands or under their control, or that they have fully administered them.

It is said that, in England, courts of equity exercise a concurrent jurisdiction with the spiritual court in these matters; but where

the case is such that the ecclesiastical court cannot do complete justice in the cause, chancery has not only a concurrent, but exclusive jurisdiction. Thus, where the husband sues in the spiritual court for a legacy bequeathed to the wife, the court of chancery will grant an injunction to stay the proceedings, since the ecclesiastical judge has no authority to compel a settlement. So in cases of legacies to infants, equity will interfere in their behalf to protect their interests and to give proper directions for securing and improving the fund for their benefit, which cannot be effectually done in the ecclesiastical court. (*2 Wms. Ex.* 1781. *2 Rep. on Legacies*, 694, 3d ed.)

But these reasons for ousting the surrogate's court of jurisdiction do not now exist in this state, whatever may have been the case before the revised statutes of 1830. It is believed that the surrogate has power to protect the rights of the wife when the husband sues for a legacy bequeathed to her, and can equally with the court of chancery guard the rights of infants. (*2 R. S.* 91, §§ 42 to 51. *McLoskey v. Reid*, 4 *Bradf.* 334.) The acts of 1848 and 1849, to protect the property of married women, which have been already referred to elsewhere, sufficiently guard all bequests to the wife at the present day from being seized and appropriated by the husband or his creditors, without her consent.

The surrogate has in these matters, in many respects, a more ample jurisdiction than is possessed by the English ecclesiastical courts. In matters of account, it has been treated by the chancellor as concurrent with that of courts of equity. The pendency of a suit in chancery, therefore, by one creditor for an account, if the suit has not proceeded to a decree, is no bar to a proceeding instituted before the surrogate by another creditor for an account. But if the same creditor, who has filed a bill in chancery against an executor or administrator for an account, afterwards cites him to an account before the surrogate, the pendency of the suit in chancery may be set up before the surrogate, in the nature of a plea in abatement, and will constitute a valid objection to the proceedings there. (*Rogers v. King*, 8 *Paige*, 210.)

In the case of proceedings in courts of concurrent jurisdiction, there will be a point in which one or the other will obtain the exclusive control. Hence, after a decree for an account has been

made in a chancery suit for the benefit of all persons interested in the estate of the deceased, such decree will deprive every such person of the right to proceed before the surrogate for an account; and upon a proper application, the court of chancery, after such decree, will grant an injunction as a matter of course, to stay all proceedings for an account before the surrogate, and to compel them to come in and establish their claims under the decree. (*Rogers v. King, supra.*) The same jurisdiction formerly possessed by the chancellor is now enjoyed by the supreme court.

But this right of the court which has first acquired jurisdiction of the cause to restrain proceedings in another court of concurrent jurisdiction, is not reciprocal; nor is it necessary that it should be so. The surrogate cannot prohibit proceedings by executors or administrators in the supreme court. (*In the matter of Parker, 1 Barb. Ch. R. 154.*) The latter court will, it is to be presumed, on a proper application, grant the requisite relief.

There is another respect in which the jurisdiction of the surrogate vastly transcends that of the English ecclesiastical courts. The spiritual jurisdiction, as is stated by an eminent English writer, (2 *Wms. Ex'rs*, 1783,) extends to legacies of personal property only; therefore, if lands be devised to be sold for the payment of legacies, or if the legacies in any way arise out of the freehold, they can be sued for only in a court of equity. (*Barker v. May, 9 Barn. & Cres. 489.*)

With us, however, the surrogate has jurisdiction to decree the payment of debts and legacies, where by any last will proved in his office a sale of real estate shall be ordered to be made either for the payment of debts or legacies. (2 *R. S.* 109, § 57.) The statute in this respect gives him the same power over the fund arising from such sale, both to decree an account and to enforce payment and distribution, as if it had been the personal property of the deceased. (*Id.*) Upon the doctrine of equitable conversion, the whole estate, under such a will, is to be considered as personal estate, from the death of the testator, so that the rents and profits of the real estate received by the executor, and the proceeds of a sale thereof made by him, become legal assets in his hands, for which he is bound to account as personal estate. (*Stagg v. Jackson, 1 Comst. 206, aff. S. C. 2 Barb. Ch. R. 86. Bloodgood v.*

Bruen, 2 *Bradf.* 8. *Id.* 107. *Clark v. Clark*, 8 *Paige*, 153.) The same rule applies where a sale of real estate is made in pursuance of *an authority given* by any will, as where it is *ordered* to be sold. (*Laws of 1837*, ch. 460, § 75. 3 *R. S.* 198, 5th ed.) A sale in either case works out an equitable conversion of the real into personal estate, and subjects it to the jurisdiction of the surrogate's court. In such a case, where the will directs real and personal property to be sold by the executors, and makes but one fund of both the real and personal property of the testator, for the purposes of the will, neither the executors or the estate should be subjected to the expense of taking two accounts of the same fund, or of different parts thereof; one before the surrogate and the other in a court of equity. The statute is broad enough to give the surrogate jurisdiction over both. (*Stagg v. Jackson*, *supra.*)

But whether, where the estate has not been devised to the executors in trust to sell, or where they have not been *expressly* ordered to sell; or where authority has not been, in terms, given to them to sell and dispose of it, the executors can, in the surrogate's court, enforce a mere *charge* of debts or legacies upon the testator's real estate, by a sale thereof, has not yet been decided. It would seem that he cannot. He is expressly prohibited from ordering the sale of real estate to satisfy judgments, mortgages or other charges upon the real estate of the deceased; and every sale ordered by him is required to be made subject to all charges by judgment, mortgage or otherwise, upon the lands so sold, existing at the time of the death of the testator or intestate. (2 *R. S.* 102, § 14. *Id.* 105, § 32.) Such a charge could only be enforced by bill in equity before the revised statutes, and it is believed that the law is unaltered in this respect at this day. (*Pelletreau v. Rathbone*, 18 *John. R.* 428. *Lockwood v. Stockholm*, 11 *Paige*, 87.)

There are doubtless other cases where the remedy of creditors, legatees and distributees can be better asserted in a court of equity, than in the surrogate's court; and this is the case, too, in many instances where the jurisdiction is concurrent. But the consideration of this class of cases does not belong to this treatise.

The surrogate's court has no power to compel the execution of

trusts; and therefore, where a legacy is given to trustees, or a trust is created other than what arises from the office of executor, the remedy can only be enforced in a court of equity. But if the trust has been executed, and the executor merely withholds the legacy, the surrogate, it seems, has jurisdiction. By a recent statute, testamentary trustees may, at their option, render their accounts before the surrogate; but this belongs to the subject of the next section. (2 *R. S.* 94, § 66, *as amended by the Laws of 1850, ch. 272. Grignon v. Grignon*, 1 *Hagg.* 535.)

A suit instituted by a creditor, legatee or next of kin, after the expiration of eighteen months from the date of the letters testamentary or of administration, may, at the election of the executor or administrator, be the basis of a final settlement of his administration. (2 *R. S.* 93, § 60.) If he suffers it to proceed against him to a final decree, without bringing before the court the parties in interest, he is left exposed to be again proceeded against by the other persons interested in the estate. (*Bronson v. Ward*, 3 *Paige*, 189. *Stone v. Morgan*, 10 *id.* 615. *Campbell v. Bruen*, 1 *Bradf.* 224. *Westervelt v. Gregg*, 1 *Barb. Ch. R.* 469.) The decision is not conclusive on such as are absent and have not been cited. An executor or administrator when he is required by the surrogate to render an account, if he desires to have the same finally settled, in the surrogate's court, must apply to the surrogate for a citation, requiring the creditors and next of kin of the deceased, and the legatees, if there be any, to appear before him, on some day therein to be specified, and to attend the settlement of such account. (2 *R. S.* 93, § 60. *Toller*, 494.)

The proceedings and practice on such an application will be treated of in the next section. We shall also postpone to the next section the principles on which the accounts of executors and administrators are to be stated and settled.

SECTION II.

Of the parties necessary to a general account, the mode of serving process, and herein of the appointing guardians ad litem for minors, and notice to creditors to exhibit claims.

The executor or administrator, being required by the order of the surrogate to render an account, as was mentioned in the preceding section, and being desirous of having the account finally settled, may, on his part, apply to the surrogate before whom he is summoned to account for a citation requiring the creditors and next of kin of the deceased, and the legatees, if there be any, to appear before him on some day therein to be specified, and to attend the settlement of such account. (2 R. S. 93, § 60.) By applying for such citation, he admits the right of the creditor, legatee, or next of kin to call him to account. (*Kellett v. Rathbun*, 4 Paige, 102.) If the party on whose application the summons was issued against the executor or administrator to account, has no valid claim against the estate, either by reason of payment or otherwise, the latter should, if he desires to resist the application, put in an allegation of the fact before the surrogate, on the return of the summons. To this the actor may plead, and if it is decided in favor of the executor or administrator, it will bar the party on whose application the summons was issued, from calling the executor or administrator to account. (*Kellett v. Rathbun*, *supra*.) Enough was said on this branch of the subject in the foregoing section.

If, however, the decision is against the executor or administrator, an order should be entered by the surrogate in the minutes, requiring the executor or administrator to account. This order, it must be remembered, is different from the final decree pronounced on the account rendered. It is itself the subject of appeal, and until reversed is conclusive against the executor or administrator, that he has not fully accounted, and that the party who applied for the process has some claim against the estate. (*Kellett v. Rathbun*, *supra*.) If the executor or administrator has already settled with all persons interested in the estate, he

should resist the order compelling him to account, by some of the ways suggested in the last section, or otherwise. But if he is satisfied that the complainant has some claim against the estate, and is desirous of bringing the suit to a close, and to have the estate finally settled before the surrogate, he should present a petition to the surrogate, after being required to account, setting forth, as the case may be, the date of his appointment as executor or administrator; the death of the testator or intestate; the names of the legatees, if any; the names of the next of kin and persons entitled under the statute of distribution, in case of intestacy; their ages, if infants, and whether guardians have been appointed or not; the fact that a summons had been regularly served and an order to account duly made by the surrogate; and should conclude with a prayer for a citation to be issued by the surrogate, under his seal of office, to be directed to the creditors and next of kin, and the legatees, if there be any, and requiring them to appear before the surrogate on some day therein to be specified, and to attend the settlement of the account of his administration of the estate. (2 *R. S.* 93, § 60. *Toller*, 494.) The petition should be sworn to, and the surrogate, on filing it, should enter an order in the book of minutes for the issuing of the citation, and at the same time adjourn the hearing of the matter for which the summons issued, to the same time and place. (App. No. 77.)

With respect to the mode of serving this citation, the statute provides that it shall be served personally on all those to whom it shall be directed, living in the county of the surrogate, at least fifteen days before the return thereof; and upon those living out of the county, or who or whose residence may be unknown, either personally, fifteen days previously, or by publishing the same in a newspaper printed in the county, at least four weeks before the return thereof, and in such newspaper printed in other counties where any creditors or other persons interested in the estate of the deceased may reside, as the surrogate, upon due inquiry into the facts, shall direct. (2 *R. S.* 93, § 61.)

If any of the creditors or persons interested in the estate, reside in any other state of the United States, or in either of the provinces of Canada, the citation is required to be published once in each week, for three months, in the state paper, unless such

citation be personally served on such creditors, at least forty days before the return thereof; and if there be any such creditors or other persons interested, residing out of the United States, and out of the provinces of Canada, the citation is required to be published as aforesaid, six months. (*Id.* § 62.)

The revised statutes make no provision in case any of the parties are minors, and, therefore, leave it to be regulated by common law rules. Minors are not esteemed in law as capable of conducting or defending a suit for themselves, and therefore cannot be deprived of any of their rights by a mere neglect to appear. (*Kellett v. Rathbun*, 4 *Paige*, 102.) We had occasion to consider the mode of serving a citation on a minor in a former chapter. (*See ante*, p. 157.) It should be served in the presence of his legal guardian, or in the presence of some person upon whom the actual care and custody of the minor has for the time being devolved. The citation, in such a case, should require the minor to appear according to law; that is, by a guardian lawfully appointed. If the minor has no general guardian, or if the general guardian has an interest adverse to the rights of the minor, so that he cannot act as guardian in relation to that matter, a guardian *ad litem* should be appointed by the surrogate to protect the rights of the minor. This appointment is made by an order in the minutes, on filing the petition of the minor, if above the age of fourteen years, and the written consent of the guardian duly proved. If the infant be under the age of fourteen years, the application should be made by some one in his behalf; but the consent of the guardian should always be taken in writing before the appointment is made. No other notice need be given to the minor of an intention to appoint a guardian than what is contained in the citation. The appointment is usually made under the seal of the court, though some surrogates issue only a copy of the order. The former is deemed the preferable course.

The distinction in the spiritual courts between an infant and a minor is, that the former is so denominated if under seven years of age, and the latter from seven to twenty-one. The revised statutes have made the age of fourteen the dividing line between the two classes. One person may be appointed guardian *ad litem* for many infants. (*In the matter of Frits*, 2 *Paige*, 374.)

The court never selects a guardian *ad litem* for an infant defendant on the nomination of the adverse party. It is frequently necessary for the guardian seriously to contest the complainant's claim. It is his duty in every case to ascertain from the infant and his friends, or from other sources of information, what are the legal and equitable rights of his ward. If the infant has any substantial rights which may be affected injuriously by the proceedings in the cause, or if the claim against him is of doubtful character, it is also the duty of the guardian to attend before the court on the hearing; on the taking of testimony in the cause; on references, and on all proper occasions, to bring forward and protect the rights of the ward. And if the guardian neglects his duty, in consequence of which the rights of the infant are not properly attended to, or are sacrificed, he may be punished for the neglect. He will, in such a case, be liable to the infant for all the damage he may sustain. (*Knickerbacker v. Defreest*, 2 *Paige*, 304.)

The 116th section of the code of procedure of 1852, makes provision for the appointment of guardians ad litem for infants, as well when he is plaintiff as when he is defendant; and as well on his own motion as on the motion of the adverse party, when the infant fails to apply. Though the code of procedure does not extend to surrogates' courts, and there is no particular legislative enactment on the subject, the surrogate will be justified in protecting the rights of infants, to follow the course of practice adopted by the legislature for other courts.

The guardian ad litem, if he manages the matter confided to him with fidelity, is entitled to his reasonable expenses, and such compensation for his services as the court may deem reasonable.

As the creditors of the deceased are to be made parties to the suit, it was obviously necessary that some means should be adopted to discover their names and residence, as well as the nature and extent of their demands against the estate. This was one object of the provision which we have discussed in a previous chapter relative to the call of the executors or administrators, for the presentation of claims against the estate. It is doubtful whether creditors, not actually served with notice, or appearing, can be bound by a decree for a final account upon the service of a citation by a publication merely, as is provided for unknown parties, when

the executor or administrator has omitted to pursue the course prescribed by law to ascertain who the creditors are. As was remarked before, when the regular notice to exhibit claims has been published as the law directs, the executors or administrators have a right to assume that the claims presented in pursuance of it, are all the claims which exist against the estate, and to distribute the assets in their hands upon that hypothesis. These creditors thus become known parties, and can be reached by a citation. Those who have failed to avail themselves of this notice, are nevertheless entitled to the notice of the time and place of attending before the surrogate, for the final accounting, and which notice they receive by means of the publication required. That notice is sufficient to make them parties to the accounting, provided the notice to exhibit claims shall have been previously given.

The statute expressly provides that any creditors, legatees or other persons interested in the estate of the deceased as next of kin or otherwise, may attend the settlement of such account, and contest the same; and they and the executor or administrator shall have process to be issued by the surrogate to compel the attendance of witnesses. (2 R. S. 94, § 63. *Marre v. Ginocchio*, 2 Bradf. 165. *Metzger v. Metzger*, 1 id. 265. *Bank of Poughkeepsie v. Hasbrouck*, 2 Seld. 216.)

The testimony of foreign witnesses may be taken on commission as in the case of proving wills. (*Laws of 1837, ch. 460, § 77, page 537.*) This is done in the same manner as in courts of record.

SECTION III.

Of the mode of rendering the account, and herein of auditors and allowing the claims of the executors or administrators against the estate, and of their commissions and expenses.

On the return of the citation issued on the application of the executors or administrators, if it appears by affidavit to have been regularly served and published, as the law directs, an order should be entered in the minutes giving leave to them to render their account. If, however, any of the parties are minors, who have not appeared by guardian, a guardian ad litem should be appointed for them, before the order to account is granted. It is conceived not

to be necessary to compel the appearance of any of the defendants. If they make default, after having been regularly cited, the account rendered and finally settled, will be equally obligatory, as if they appeared. (*Kellett v. Rathbun, supra.*)

We have said that the suit brought by the creditor, on which the order to account was entered, and which led to the subsequent proceedings of the executors or administrators to have the whole accounts of their administration finally settled, should be adjourned until the return of the citation of the executors or administrators for this purpose. The two actions in truth become parts of one and the same proceeding. Like the original and cross bill in equity, both proceed together and constitute but one suit. The party who commences this action, whether he be creditor, legatee or party entitled to a distributive share, gains no advantage by reason of the priority of his action. All are to be paid in full, if there be assets enough, and if not, they are to receive such *pro rata* share as they are entitled to under the statute of distributions.

On the return day of the citation, or such other day to which the proceedings may be continued by adjournment, the account of the executors or administrators should be presented, in writing, accompanied with the vouchers for all debts, legacies and expenses paid, together with the sums claimed by them for their commissions. (For forms, see App. 75 to 83.)

Great care should be practiced in drawing up the account, that it should contain a truthful statement of all the assets for which the executors or administrators are accountable, and the disposition that has been made of the same, whether by losses or payment of debts, legacies or other claims.

It should charge the executors with the amount of the inventory, the increase of the assets by interest or otherwise, and any other property belonging to the estate, which has come to their hands. It should credit them with the decrease in the value of any of the assets; with such debts as are charged in the inventory and proved not to be collectable, and were therefore lost to the estate without their fault; for moneys paid to creditors, legatees and next of kin, naming each with the amount paid and time of payment; and the necessary expenses of the administration, including their own commissions. These statements should be in the form of debtor

and creditor, and should be sufficiently in detail to enable those interested in the settlement to make their objections, and the surrogate properly to decide them. If there are debts in the course of prosecution, the condition of the suits should be stated; and in like manner, if actions were pending against them to recover contested claims, the nature of the action, and its situation, should be set forth.

Subjoined to the account should be the oath in writing of the executors or administrators, or of one of them, in substance, that the account according to the best of their knowledge, information and belief, contains a full and true account of all their receipts and disbursements, on account of the estate of the testator or intestate, and of all sums and property belonging to the estate which have come to the hands of such executors or administrators, or which have been received by any other person by their order or authority for their use; and that they do not know of any error or omission in the account to the prejudice of any of the parties interested in the estate of the deceased. (*Williams v. Purdy*, 6 *Paige*, 166. *Kellett v. Rathbun*, 4 *id.* 102. *Gardner v. Gardner*, 7 *id.* 112. *Westervelt v. Gregg*, 1 *Barb. Ch. R.* 469. *Wilcox v. Smith*, 26 *Barb.* 316.)

The vouchers of the account should also be produced, regularly labeled and numbered, and a schedule made of each class of disbursements and receipts, and be accompanied with a general account current. These should all remain with the surrogate and be preserved by him among the muniments of his office. The executors or administrators, in addition to the general oath above mentioned, may be examined on oath touching the several payments made by them, and also touching any property or effects of the deceased which have come to their hands, and the disposition thereof. (2 *R. S.* 92, § 54.) They may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by their own oath positively to the fact of payment, specifying when and to whom such payment was made, and if such oath be uncontradicted; but such allowances shall not in the whole, exceed five hundred dollars for payments in behalf of any one estate. (*Id.* § 55.)

For the property of the deceased, perished or lost without the

fault of the executor or administrator, the latter will be credited by the surrogate. (*Id.* 56.)

It is a general principle in cases of this kind, and which is also declared by the statute, that no profit shall be made by executors or administrators by the increase, nor shall they sustain any loss, by the decrease, without their fault, of any part of the estate; but they shall account for such increase, and be allowed for such decrease on the settlement of their accounts. (*Id.* 57. *Wilcox v. Smith*, 26 Barb. 316.)

Previous to the act of 15th April, 1817, executors and administrators and guardians were not entitled to any compensation for their services in the discharge of their trust. By that act, the court of chancery was empowered, in the settlement of the accounts of guardians, executors and administrators, to make a reasonable allowance to them for their services, over and above their expenses; and when the rate of such allowance was once settled, it was required to be conformed to in all cases of the settlement of such accounts. (*McWhorter v. Benson*, *Hopkins*, 36.) In October, 1817, Chancellor Kent, by a general order, fixed the rate of compensation which has hitherto remained. It is incorporated in the revised statutes of 1830, and which as amended by the act of 1849, ch. 160, is as follows: "On the settlement of the account of an executor or administrator, the surrogate shall allow to him for his services, and if there be more than one, shall apportion among them according to the services rendered by them respectively, over and above his or their expenses, 1. For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five dollars per cent: 2. For receiving and paying any sums exceeding one thousand dollars and not amounting to five thousand dollars, at the rate of two dollars and fifty cents per cent: 3. For all sums of above five thousand dollars, at the rate of one dollar per cent; and in all cases such allowance shall be made for their actual and necessary expenses, as shall appear just and reasonable." (2 R. S. 93, § 58, as amended by ch. 160, *Laws of 1849*. 3 R. S. 179, 5th ed.) The provision for apportioning the compensation when there are several, according to the services rendered by each, is founded in the clearest equity. (*White v. Bullock*, 20 Barb. 91. *Drake v. Price*, 1 Seld. 430.)

If the will makes provision for a specific compensation to an executor, it must be deemed a full satisfaction for his services, in lieu of the allowance aforesaid, or his share thereof; unless such executor shall, by a written instrument, to be filed with the surrogate, renounce all claim to the specific legacy. (2 R. S. 93, § 59.) It sometimes becomes a question whether a legacy is intended as a compensation for services, or as a gratuity beyond the statute allowance. This subject was adverted to when we were treating of the subject of legacies, to which the reader is referred.

It has been before stated that since the revised statutes neither an executor or administrator can retain any part of the property of the deceased in satisfaction of his own debt or claim, until it shall have been proved to and allowed by the surrogate, and then shall be entitled to no preference over other debts of the same class. (2 R. S. 88, § 33.) It is in this stage of the proceedings that it will be proper for the executor or administrator, who has a claim in his own favor against the estate, to present it for allowance. The revised statutes did not prescribe the time or manner in which this should be done; but by the act of 1837, chapter 460, § 37, such claim was directed to be presented for allowance on the service and return of a citation for that purpose directed to the proper persons, or on the final account.

The account should be made out by the executor or administrator, in the same manner as the claims of other creditors of the estate, be supported by proper vouchers and verified by the oath of the party claiming it. It must be proved, also, as other accounts are, by proper evidence, and may be resisted by those whose share in the estate will be diminished by its allowance, by the statute of limitations, payment or any other defense which would be available in the case of any other creditor. (*Williams v. Purdy*, 6 Paige, 166. *Treat v. Fortune*, 2 Bradf. 116. *Rogers v. Rogers*, 3 Wend. 503. *Wilcox v. Smith*, 26 Barb. 316.)

The provision in the act of 1837, supra, for issuing a citation to the proper persons, in case the executor or administrator applies to the surrogate for the allowance of the claim in his favor against the estate, was introduced to regulate the remedy of the executor or administrator, in cases where no final account is rendered, so that it should not be asserted at an *ex parte* hearing before the

surrogate without notice. The statute does not say upon whom the citation must be served, except by the general expression, "the proper persons." The "persons" here referred to are those alone who would be prejudiced by the allowance of the claim; and whether they are legatees or next of kin, will depend upon the condition of the estate. If the assets are sufficient to pay all the debts, expenses and general legacies, the residuary legatee, if there be one, and if not, the next of kin, to whom the general residue belongs, are the only persons who have any interest in resisting the claim, and are the persons to whom the citation should be addressed in such a case. (*Treat v. Fortune, supra.*)

It is the policy of the law that all the creditors having no specific lien or statutory preference should be ratably paid; and as the preference formerly obtained by a priority of suit is abolished, there existed no reason for retaining the common law preference of the debt of an executor or administrator. The mode of enforcing the payment of claims against the estates of deceased persons having been changed, and the remedy transferred from the courts of common law and equity to that of the surrogate, it became necessary that the latter court should have power to investigate and decide on the validity of the claim belonging to an executor or administrator against the estate which he represents. In an action at common law, by a person interested in the estate, against an executor or administrator, who interposed a plea of retainer, for his own debt, it was always competent for the plaintiff to reply in such manner, as to require the former to prove the debt on the trial. If such debt was given in evidence under the plea of plene administravit, the plaintiff might, in like manner, rebut it by showing payment by the deceased in his lifetime, or other matter depriving the executor or administrator of a right of retainer. (2 *Starkie's Ev.* 324.) There is nothing novel, therefore, in the principle that the debt of an executor or administrator must, before allowance, be proved to the surrogate. The retainer by an executor or administrator was never permitted, before the revised statutes, unless the debt was proved on the trial to the satisfaction of the court, in which the action was depending, or confessed by the pleadings. (*Rogers v. Rogers, supra.*) In other words, the executors or administrators were never authorized to decide in their

own favor, and without appeal, how much should be allowed to them on any claim they might present against the estate. The parties in interest could always, by a bill in equity, at least, and often in an action at law, question the validity of the claim and require it to be passed upon by the appropriate tribunal.

The hearing of the allegations and proofs of the respective parties may be adjourned from time to time as shall be necessary. (2 R. S. 94, § 64.) The rules of evidence in such cases are those which prevailed in courts of equity prior to the code of procedure; the latter system of practice for the examination of interested witnesses and parties not applying to proceedings in surrogates' courts. (*Marre v. Ginochio*, 2 Bradf. 165.) The objections to an account should be stated in the form of distinct and specific allegations, *surcharging* for omissions when the estate ought to have been credited, and *falsifying* for improper debits against the estate. (*Metzger v. Metzger*, 1 Bradf. 265. *Willard's Eq. Juris.* 142.)

In this stage of the proceedings, on the rendering a final account, the surrogate is empowered to appoint one or more auditors to examine the accounts presented to him, and to make a report thereon, subject to his confirmation. An allowance, not exceeding two dollars a day, may be made to each of them for their services, to be paid out of the estate. (2 R. S. 94, § 64.) The order for their appointment should be entered in the minutes.

With respect to the powers and duties of auditors, the statute affords little or no light. These officers are to be distinguished from referees, provided for in other parts of the statute, and from masters and examiners in chancery under the former practice of the courts. They were probably borrowed from the practice in the old action of account, without conferring upon them the power which the legislature conferred upon auditors in that action. It will be observed, that though the action of account was retained by the revised statutes, in a modified form, the office of auditors was abolished and that of referees substituted. The action is now superseded by the code of procedure.

The duties of an auditor, as far as can be gathered from the statute, are to examine the vouchers and accounts rendered; to see

whether the same are correctly stated ; to restate the accounts, if necessary ; to settle questions with regard to the computation of interest, the appropriation of payments, apportionment, exoneration, contribution, charge and discharge, legacy, satisfaction, advancement and such other matters as properly arise on the stating of accounts in courts of equity. (*See Willard's Eq. Juris. title Account, passim.*) He has no power to administer an oath to witnesses, nor is he required to take an oath of office before entering on the discharge of his duties.

The appointment of an auditor should not be made until all the proofs have been taken in the cause, and the executor or administrator has been examined on oath before the surrogate, if such examination on oath has been required. Then, the accounts, vouchers, pleadings and proofs of every description may be referred to the auditor to make and state the accounts. As any creditor, legatee or other person interested in the estate as next of kin, or otherwise, may attend the settlement of such account and contest the same before the *surrogate*, it is presumed that they may also attend before the *auditor*, on his examination and statement of the accounts. It is a significant fact to show that the auditor has no power to examine witnesses before him upon oath, that the 63d section allows of process to compel the attendance of witnesses before the surrogate on the final accounting, and the 64th section, providing for the appointment, powers and duties of auditors, is silent on that subject. (*See on the subject of auditors, Westervelt v. Gregg*, 1 Barb. Ch. R. 469 ; *Wilcox v. Smith*, 26 Barb. 316 ; and *Gardiner v. Gardiner*, 7 Paige, 112.)

But there are numerous questions, as we have shown, of great importance, which may arise on the statement of the accounts by the auditor. If his duties are faithfully discharged, his report will relieve the surrogate of much labor in making the final disposition of the cause. It is presumed that on the coming in of the auditor's report, and before its confirmation, the parties in interest are entitled to be heard before the surrogate on the question of such confirmation, and after it has been confirmed, to be heard on the form of the final decree. These matters are left unprovided for by the statute,

and naturally belong to the surrogate, to regulate as a matter of practice, according to the equity of each case.*

SECTION IV.

Of the effect of the final settlement ; of the form of the decree thereon ; distribution, and the mode of enforcing it.

The statute has prescribed the effect which shall be given to a final settlement before the surrogate, by declaring that it shall be conclusive evidence against all creditors, legatees, next of kin of the deceased, and all persons in any way interested in the estate, upon whom the citation shall have been served, either personally, or by publication as therein directed, of the following facts, and of no others :

1. That the charges made in such account for moneys paid to creditors, to legatees, to the next of kin and for necessary expenses, are correct :
2. That such executor or administrator has been charged all the interest for moneys received by him, and embraced in his account, for which he was legally accountable :
3. That the moneys stated in such account as collected, were all

* The 6th chapter of Part II of the revised statutes, as reported by the revisers, contemplated the rendering of a final account in all cases. In passing through the legislature it was so modified as to leave it optional with the executors or administrators to render such account or not. They were left liable, however, to be called on, by any person interested, to render an account. The 33d section (being the 30th section in the report) giving no preference to the claims of executors or administrators, and taking away the right of retainer of any thing except what was proved to and allowed by the surrogate, was a necessary part of the system. The debt due to an executor or administrator was thus put on a footing with the other debts ; and as the other creditors could not cite the executors or administrators to account till after eighteen months, so the executors or administrators could not cite the persons interested to attend the settlement of his accounts till after eighteen months from the date of his letters. This section was left unaltered, and, therefore, applied only to the case of rendering a final account. And this made it advisable, in 1837, to adopt the 37th section of the act of that year, chapter 460, to enable the executor or administrator, in case he did not wish a final accounting, or for any reason desired to have his own claim against the estate allowed, at an earlier day, to cite the persons interested before the surrogate, for the purpose of having his claim examined and allowed.

that were collectable, on the debts stated in such account, at the time of the settlement thereof:

4. That the allowance, in such account, for the decrease in the value of any assets, and the charges therein for the increase in such value, were correctly made.

The revised statutes as originally enacted, provided that the preceding section should not extend to any case where an executor is liable to account to a court of equity, by reason of any trust, expressly created by any last will and testament. (2 *R. S.* 94, § 66.) But under that section the chancellor held in *Stagg v. Jackson*, 2 *Barb. Ch. R.* 86, decided in January, 1847, and affirmed by the court of appeals, 1 *Comstock*, 206, that where a will directs real and personal estate to be sold by the executors, and makes but one fund of the real and personal estate of the testator, for the purposes of the will, the surrogate had jurisdiction to call the executors to account for the proceeds of the real estate, and for the rents and profits thereof received by him previous to such sale, under and by virtue of the power in the will. Upon the doctrine of equitable conversion, the proceeds of the real estate become legal assets in the hands of the executor, for which he is bound to account as personal estate.

But notwithstanding that decision, there were still numerous cases of trusts over which the surrogate had no jurisdiction; and for which he could not cite the executors to account, or settle their accounts if voluntarily submitted to his jurisdiction. To remedy this defect, the 66th section was so changed by the act of 1850, *ch.* 272, (3 *R. S.* 181, 5th ed.) that any trustee created by any last will or testament, or appointed by any competent authority to execute any trust created by any such last will or testament, or any executor or administrator with the will annexed, authorized to execute any such trust, may from time to time render and finally settle his accounts before the surrogate in the manner provided by law for the final settlement of accounts of executors or administrators, and may, for that purpose, obtain and serve, in the same manner, the necessary citations requiring all persons interested to attend such final settlement, and the decree of the surrogate on such final settlement is made subject to appeal in the manner provided for an appeal from a decree of a surrogate on the final set-

tlement of the accounts of executors and administrators, and the like proceedings are to be had on such appeal. The final decree of the surrogate on the final settlement of an account provided for in this section as amended, or the final determination of the appellate tribunal, in case of an appeal, are declared to have the same effect as the decree or judgment of any other court of competent jurisdiction, on the final settlement of such accounts and of the matters relating to such trust, which shall have been embraced in such accounts or litigated or determined on such settlement thereof.

This provision operates greatly to enlarge the jurisdiction of the surrogate in cases where the executor, or testamentary trustee, *elects* to submit himself *voluntarily* to the jurisdiction of the surrogate; which he may do when cited to account, or, voluntarily, after the expiration of eighteen months, as will be shown more at large in the next section. But, it is believed, he cannot be *compelled* to render such account, except in cases where there has been an equitable conversion of the real and personal estate into one fund, as in *Stagg v. Jackson*, and kindred cases.

Whenever an account is rendered and finally settled, except when an executor or administrator accounts to his successor in the administration, if it appears to the surrogate that any part of the estate remains to be paid or distributed, he should make a decree for the payment and distribution of what shall so remain, to and among the creditors, legatees, widow and next of kin to the deceased, according to their respective rights; and in such decree settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share; to whom the same shall be payable; and the sum to be paid to each person. (2 R. S. 95, § 71. *Bank of Poughkeepsie v. Hasbrouck*, 2 Seld. 216. *Campbell v. Bruen*, 1 Bradf. 224.)

As choses in action are not deemed assets until reduced to possession, and as the statute contemplates a speedy settlement of the estate, it was obviously necessary that provision should be made for the transfer of securities belonging to the estate, as well as for the indemnity of the executor or administrator against claims not due, or for which a suit is depending. Accordingly it is enacted that in the order for final settlement and distribution, the

surrogate may, upon the consent in writing of the parties who shall have appeared, direct the delivery of any personal property which shall not have been sold, and the assignment of any mortgages, bonds, notes, or other demands not yet due, among those entitled to payment or distribution, in lieu of so much money as such property or securities may be worth, to be ascertained by the appraisement and oath of such persons as the surrogate shall appoint for that purpose. (2 *R. S.* 95, § 72.)

Subsequent sections of the statute empower the assignee of such securities to sue and recover upon the same, at his own costs and charges, in the name of the executor or administrator making such assignment or otherwise, in the same manner as such executor or administrator might have done. Under the code of procedure it is presumed the action may be brought in the name of the person to whom the assignment was made, he being the real party in interest. (*Code*, §§ 111 to 113.)

It may happen that at the making of the final decree, there are claims existing against the estate of the deceased which are not due, or upon which a suit is then pending. In such a case the surrogate should, upon the representation of the executors or administrators, allow a sum sufficient to satisfy such claim, or the proportion to which it may be entitled, to be retained for the purpose of being applied to the payment of such claim when due, or when recovered, or of being distributed according to law. The sum so retained may be left in the hands of the executor or administrator, or may be directed by the surrogate to be deposited in some safe bank, to be drawn only on the order of the surrogate. (2 *R. S.* 96, § 74.)

This representation of the executor or administrator should be in writing. The most eligible mode of presenting the subject for the action of the surrogate is by petition, duly verified by affidavit. The order consequent thereon should be embraced in the final decree.

The statute does not contemplate any enrollment of the final decree. It is merely required to be entered at large in the book of minutes. It thus becomes a record, and may be exemplified under the seal of the court, if it is required to be used as evidence in any other court. (2 *R. S.* 222.)

If the decree be against the executor or administrator, requiring him to pay money, it may be docketed in the office of the clerk of the county court, and in New York in the office of the clerk of the court of common pleas, and thenceforth be a lien on all the lands, tenements and real estate of every person against whom it is entered, and execution may be issued thereon in the same manner as though the same was a judgment obtained in said court. (*Laws of 1837, ch. 460, §§ 63, 64. Laws of 1844, p. 91, amending same. 3 R. S. 366, 5th ed.*) The form of a final decree should be similar to a final decree in the late court of chancery, in similar cases. It should recite enough of the proceedings to give a full understanding of the matters in controversy, and should be so framed as to settle and determine all questions concerning any debt, claim, legacy, bequest, or distributive share; to whom payable, and the amount to be paid to each person. (2 *R. S.* 95, § 71. *Campbell v. Bruen, 1 Bradf. 224.*)

The principles on which distribution is to be made, and the order of paying debts, have already been discussed. In like manner we have also treated of the various expenses attending the administration of the estate, and the allowances to be made to the executor or administrator. It is not necessary, under the existing law, to record at length the accounts settled and allowed; but they are to be filed with the surrogate, and he is required to record, with his decree, a summary statement of the accounts as the same shall be finally settled and allowed by him; and which statement shall be referred to and taken as part of the final decree. (*L. of 1837, ch. 460, § 2. 3 R. S. 365, 5th ed.*)

There are, in general, three modes of enforcing the performance of a final decree. 1. If it be for the payment of money, the filing and docketing of the decree in the clerk's office and the issuing of an execution thereon out of the county court, or in New York out of the court of common pleas, as has been above stated, will afford a speedy and effectual remedy, and the one first to be resorted to. (*See ante. Doran v. Dempsey, 1 Bradf. 490.*) 2. Obedience to a final decree may also be enforced by a prosecution, under the direction of the surrogate, of the bond of the executor or administrator. The money collected on the bond must be applied in satis-

faction of the decree, in the same manner as it ought to have been applied by the executor or administrator. The like remedy is also extended to a decree for rendering an account, or for the payment of a debt, legacy or distributive share. (*L. of 1830, ch. 320, § 23. 3 R. S. 204, 5th ed.*) If the decree be for the payment of a sum of money by one party to another, an action of debt will lie therefor, whether such sum was for a legacy or a debt. (*Dubois v. Dubois, 6 Cowen, 494.*) 3. By attachment against the person of the executor or administrator who neglects or refuses to comply with the decree. (*2 R. S. 222, § 6, sub. 4. Doran v. Dempsey, supra. Seaman v. Duryea, 1 Kern. 324.*) This attachment is required to be in form similar to that used by the late court of chancery in analogous cases. (*Id.*)

Although the court of chancery was abolished by the constitution of 1846, and its jurisdiction vested in other tribunals, yet, as the practice of that court in proceeding, by attachment, to enforce civil remedies was made applicable to surrogates' courts, and the practice of these courts has been left unaffected by the code, it becomes necessary to refer briefly to the practice, in this respect, of the court of chancery in 1830, and, indeed, into its practice anterior to the present constitution.

In the case of *The Albany City Bank v. Schermerhorn*, (9 *Paige*, 374,) the chancellor observed that the statute relative to proceedings as for contempt to enforce civil remedies and to protect the rights of parties in civil actions, has prescribed two modes of proceeding, where the misconduct complained of is not committed in the immediate view and presence of the court; one of which is by an order on the accused party to show cause, at some future time, to be specified in the order, why he should not be punished for his alleged misconduct; and the other is to grant an attachment to arrest the accused and bring him before the court to answer for the misconduct. (*2 R. S. 535, § 5.*) In either mode of proceeding, however, the party complaining of the alleged misconduct, must produce proof thereof, by affidavit or a sworn petition or other legal evidence, as the foundation of the proceedings. It must thus be shown that a certified copy of the decree has been served on the executor or administrator, that he was requested to comply with it, and that he had neglected or refused to do so. An

attachment may thereupon be issued, an order for that purpose having been first entered.

This branch of the proceedings will generally be conducted by professional gentlemen, and the mode of practice will be found in books devoted to the practice of the court of chancery, and is fully detailed in the statute and by the chancellor on several occasions. (2 R. S. 222. *Id.* 534 to 540. *The Albany City Bank v. Schermerhorn, supra.* *The People v. Rogers*, 2 Paige, 104.) It is not deemed expedient to detail more at length, in this work, the course of a proceeding which will be found described fully by Mr. Barbour, in his practice of the court of chancery. (App. 75 to 83.)

SECTION V.

Of rendering an account by an executor or administrator in other cases, and of costs.

We have hitherto treated only of the rendering an account for a final settlement when the executor or administrator, upon being *required* by the surrogate to account, desires to have the same finally settled. (2 R. S. 93, § 60.) But there is another proceeding in which the executor or administrator is *voluntary*, and which leads to the same result. By the 70th section (2 R. S. 95) it is enacted that after the expiration of eighteen months from the granting of letters testamentary, or of administration, an executor or administrator may render a final account of all his proceedings to the surrogate who appointed him, *although not cited to do so*. To render this account final and conclusive, a citation must be obtained from the surrogate to all persons interested in the estate of the deceased, to attend the final settlement of the accounts of the executor or administrator. This citation must be served in the same manner and the same proceedings must be had for a final settlement, and with the like effect in all respects as in the case of a settlement, at the instance of a creditor, legatee, or next of kin. These proceedings have already been described in the preceding section of this work.

The final decree operates as a discharge to any other or further accounting by the executor or administrator as to the matters embraced in the account settled. In this respect it is as conclu-

sive as the decree of the court of chancery on a bill to account. It is, indeed, a substitute for the *quietus* formerly granted by the court of probates. It is a cheap and expeditious mode of settling an estate, without resorting to a bill in equity.

An executor or administrator did not render an account in the spiritual court unless cited to do so by some person having an interest in the estate. (2 *Wms. Ex.* 1776. 2 *Burn's E. L.*, quarto ed. 765.) The provision of our statute which permits such an account to be rendered and finally settled, on the application of the executor or administrator alone, is an obvious improvement.

In the ecclesiastical courts, where the ordinary found the account to be true and perfect, he pronounced for its validity; and the executor or administrator was thereafter acquitted and discharged from further molestation and suits, and was not liable to be again called to an account. The statute of 1 Ed. 6, c. 2, provided that all acquittances of and from all accounts made by executors, administrators or collectors of goods of any dead man should be made in the name of the king, as in writs original or judicial at common law. (2 *Burn's E. L.*, quarto ed. 766.) Under our statute, a copy of the final decree in account seems to be all that is required by the executor or administrator, as the evidence of his discharge.

The liability to account, and the right to cite all persons interested in the estate to attend the settlement thereof, have been extended to an executor or administrator, whose authority has been revoked or superseded. Thus, it is enacted that whenever the authority of an executor or administrator shall cease, or be revoked or superseded, for any reason, he may be cited to account before a surrogate, at the instance of the person succeeding to the administration of the same estate, in like manner as before provided for a creditor. (2 *R. S.* 95, § 68.) And in every such case the following section enacts, that the executor or administrator may cite the person succeeding to the administration of the same estate, to attend an account and settlement of his proceedings, before the surrogate, by giving such reasonable notice as the surrogate shall direct, and by serving and publishing in the manner herein before provided, a citation to creditors and others; and

such settlement and account it is declared shall have the like effect in all respects as in the case of a settlement at the instance of a creditor.

In the ecclesiastical courts costs are given in matters of account, both in original suits and on appeal. This practice, it seems, did not prevail here before the revised statutes in 1830. In *Reed v. Vanderheyden*, 5 *Cowen*, 719, it seems to have been taken for granted by the members of the court of errors, that the surrogate had no authority, at that early day, to award costs. *Shultz v. Pulver*, 3 *Paige*, 185. *Western v. Romaine*, 1 *Bradf.* 37. *Burtis v. Dodge*, 1 *Barb. Ch. R.* 91.)

This defect is now removed by the revised statutes, which provide, that in all cases of contests before a surrogate's court, such court may award costs to the party in the judgment of the court entitled thereto, to be paid either by the other party personally, or out of the estate which shall be the subject of such controversy. (2 *R. S.* 223, § 10.) The act of 1837, ch. 460, § 70, provided that when costs are allowable, they shall be taxed according to the same rate allowed for similar services in the courts of common pleas. Although those courts have since been abolished by the constitution of 1846, and various changes have been made in the fee bill since that time, it is believed that the fee bill existing when the act of 1837, ch. 460, took effect, is still to govern the rate of compensation in cases of this kind.

The principles on which costs are to be allowed or refused in controversies before the surrogate, are analogous to those which guided the discretion of the chancellor in litigation in the old court of chancery. The same rules prevail now in the supreme court, in those cases where costs are left by the code to the discretion of the court.

The fees of the surrogate for services done and performed are prescribed by the statute of May 7, 1844. (*Ch.* 300, § 2. 3 *R. S.* 919 to 922.) Of these an account is kept by the surrogate in the book of fees, which is required to be open at all reasonable times for inspection, like his other books of record. (*L. of 1837, ch.*

460, § 3.) As the surrogate is now paid by a salary, and is required to account for the fees and perquisites received by him, with the financial officer of the county, there is no temptation to multiply charges unnecessarily.

CHAPTER VI.

OF GUARDIAN AND WARD.

Among the subjects over which the surrogate's court has jurisdiction, is that of the appointment of guardians for minors, the removal of them, the direction and control of their conduct, and the settlement of their accounts. (2 R. S. 220, § 1, sub. 7.) The jurisdiction of the surrogate is not exclusive in these matters, but is nearly concurrent with that of the supreme court; which latter has succeeded to the jurisdiction of the late court of chancery. It is supposed that the jurisdiction of the surrogate, in this respect, falls short of that of the supreme court.

SECTION I.

Of the different kinds of guardians; their powers and duties.

There are two kinds of guardianship; one by the common law and the other by the statute. (2 Kent's Com. 218.)

At common law there were three kinds of guardians, namely, guardian by nature, guardian by nurture, and guardian in socage.

Guardian by *nature* is the father, and on his death, the mother. It terminates when the child arrives at the age of twenty-one years.

This guardianship extends only to the *person* of the child. Neither the father or mother, as guardian by nature, has any control over the property, real or personal, of the child. (*Fonda v. Van Horne*, 15 Wend. 631. *Genet v. Talmadge*, 1 John. Ch. 3. *Id.* 561. *Hyde v. Stone*, 7 Wend. 354.) Nor has he any right, as such guardian, to receive the rents and profits of the infant's land. (*Jackson v. Combs*, 7 Cowen, 36. S. C. 2 Wend. 153.)

Under the operation of our laws making all the children equally heirs, the guardianship by nature would seem to extend to all the children, and not be confined, as at common law, to the heir apparent, or eldest son.

Guardian by *nurture* occurs only when the infant is without any other guardian, and belongs exclusively to the parents, first to the father and then to the mother. (2 *Kent's Com.* 221.) Originally it applied only to the younger children who were not heirs apparent. With us it has become obsolete. Being concurrent with guardianship by nature, there is no reason for retaining it as a separate institution. It never gave the guardian any right to control the property of the child, and it ended when the child arrived at the age of fourteen years, in both males and females.

Guardian *in socage* had, at common law, the custody of the land, and was entitled to the profits, for the benefit of the heirs. He might lease the land, avow or bring trespass, in his own name. This guardianship ceased when the infant arrived at the age of fourteen years, unless no other guardian was appointed, when it continued until the infant arrived at mature age. (*Byrne v. Van Hoesen*, 5 *John.* 66. *Field v. Schieffelin*, 7 *John. Ch.* 150. *Holmes v. Seeley*, 17 *Wend.* 75.) On the death of the father, the mother succeeded as such guardian, and could, in that character, enter on the lands of the heir. (*Jackson v. De Walts*, 7 *John.* 157.)

Under the operation of our laws of descent, which allow both the father and mother, in certain contingencies, to inherit from the child, this species of guardianship has disappeared. At common law, this guardianship belonged only to such blood relation of the infant as could not by possibility inherit from him. Such case can rarely occur.

The revised statutes, however, have provided a substitute for this guardianship. Thus, by the act concerning tenures, (1 *R. S.* 718, § 5,) it is enacted, that where an estate in lands shall become vested in an infant, the guardianship of such infant, with the rights, powers and duties of a guardian in socage, shall belong, 1. To the father of the infant: 2. If there be no father, to the mother: 3. If there be no father or mother, to the nearest and eldest rela-

tive of full age, not being under any legal incapacity; and as between relatives of the same degree of consanguinity, males shall be preferred to females. To every such guardian, all statutory provisions that are or shall be in force, relative to guardians in socage, shall be deemed to apply. The rights and authority of every such guardian shall be superseded in all cases where a testamentary or other guardian shall have been appointed under the provisions of the third title of the eighth chapter of part second of the revised statutes.

This species of guardianship extends not only to the person, and all the real estate, even to hereditaments, which do not lie in tenure, but to the personal estate also. The title, however, to this guardianship, cannot accrue unless the infant be seised of lands.

In addition to the foregoing, there are the following species of guardianship: 1. Testamentary guardians. These are founded on the deed or last will of the father, and they supersede the claims of any other guardian, and extend to the person and real and personal estate of the child, and continue until the child arrives at the age of twenty-one years, if so expressed in the grant. This power, it is said, was first given by the statute of 12 Charles 2d, and it has been extensively adopted in this country. The same power is given, and its effects are declared, by the New York revised statutes. (*2d vol.* 150.) Thus, it is enacted that every father, whether of full age or a minor, of a child likely to be born, or of a living child, under the age of twenty-one years, and unmarried, may, by his deed or last will, duly executed, dispose of the custody and tuition of such child, during its minority, or for any less time, to any person or persons in possession or remainder. Every such disposition, from the time it takes effect, vests in the person or persons, to whom it is made, all the rights and powers, and subjects him or them to all the duties and obligations of a guardian of such minor, and is valid and effectual against every other person, claiming the custody or tuition of such minor, as guardian in socage, or otherwise. The guardian so appointed has power, by law, to take the custody and tuition of the said minor, to maintain all proper actions for the wrongful taking or detention of the minor, and to recover damages in such actions for the benefit of his ward. It is

his duty also to take the custody and management of the personal estate of the minor, and the profits of his real estate, during the time for which such disposition shall be made, and he may bring such actions, in relation thereto, as a guardian in socage might by law.

The father and not the mother has the power of appointing a guardian, (*Matter of Pierce*, 12 *How.* 532;) but even he does not possess the power, if the child, though a minor, be married. The guardianship of his infant wife belongs to the husband. (*Kettletas v. Gardner*, 1 *Paige*, 488.) A female ward of the court is not discharged, upon her marriage, from the protection of the court, without a special order. (*Matter of Whittaker*, 4 *J. Ch. R.* 378.)

The father may limit the appointment for a less time than during minority; he may confer the guardianship on one or more persons; and, of course, he may grant the guardianship of the person to one person, and of the estate to another.

2. Chancery guardians, or such as are now appointed by the supreme court, under the power formerly possessed by the court of chancery, are either general or special. The chancery guardian continues until the majority of the infant, and is not controled by the election of the infant when he arrives at the age of fourteen. (*Matter of Nicoll*, 1 *J. Ch. R.* 25.) The court of chancery has a general control over all guardians by whomsoever appointed; and the authority to call them to account, and of displacing them. (*Matter of Andrews*, 1 *J. Ch. R.* 99. *Ex parte Crumb*, 2 *id.* 439.) The supreme court, by virtue of its jurisdiction as a court of equity over persons laboring under disability, can take the custody of an infant from the control of its father, and give it to the mother. (*The People v. Mercein*, 8 *Paige*, 47. *S. C.* 25 *Wend.* 64. *The People v. Chegaray*, 18 *Wend.* 637.) As this court can take the custody of an infant from the parents, so it can appoint a guardian for an infant, during the lifetime of the father or mother, and without their consent.

3. Guardians appointed by the surrogates of the different counties of the state. According to *Swinburne*, page 216, *Reeve's Dom. Rel.* 317, the spiritual court originally possessed the power of appointing guardians for minors in relation to the personal estate. This jurisdiction was not conferred on the surrogates' courts in this

state until the year 1802, (25 Sess. *Laws*, ch. 110,) and it then extended only to the power of *appointment*, and conferred no authority over them as trustees ; or jurisdiction to remove them, or call them to account. (*In the matter of Andrews*, 1 J. Ch. R. 99. *Ex parte Crumb*, 2 id. 439.)

By the existing statute it is enacted that the surrogate, when no guardian shall have been appointed by the father of the minor, by deed or will, shall have the same power to allow and appoint guardians for minors whose place of residence is in the county of the surrogate, as is possessed by the supreme court. (2 R. S. 151, § 6. 3 R. S. 244, 5th ed. as altered.) This is to be understood with some qualification. The surrogate cannot appoint a guardian for an infant over fourteen years of age, against the consent of the infant. He can, in such a case, merely *allow* a guardian nominated by the infant. (*Sherman v. Ballou*, 8 Cowen, 304.) The appointment of a guardian by the surrogate for an infant under fourteen terminates at that age, if the infant on becoming fourteen, chooses a different person, and his choice is allowed by the surrogate. The present supreme court succeeding to the jurisdiction of the late court of chancery, are not thus restricted. They can appoint a guardian contrary to the nomination of the infant. Again, the surrogate cannot appoint a guardian for an infant whose father is living. This is fairly implied, from the power to appoint being given to the surrogate only on the failure of the father to make a testamentary appointment ; an event which cannot be known until his death.* (*Foster v. Mott*, 3 Bradf. 412.)

* The only reported case to the contrary which has fallen under my observation, is a dictum of *Welles, J.* in *Clark v. Montgomery*, 23 Barbour, 472. In the course of his opinion, the learned judge says : " It is unusual for the surrogate to appoint a general guardian for an infant having a father, yet it may be, and sometimes is done ; and then the guardian succeeds to the rights and duties of the father, subject to the authority and discretion of a court of equity." It was not the direct point in the case, nor does it appear to have been discussed by counsel, or to have been passed upon by the associates of the learned judge. No case is referred to as authority. Though the dictum is entitled to great respect from its source, it is believed to be incorrect. It is not denied that the supreme court, succeeding to the authority of the late court of chancery, has the power to take the guardianship of infants from the parents, against their consent. But the surrogate has not yet

Every guardian so appointed by the surrogate, possesses the same power as a testamentary guardian. He may be cited to account before the surrogate; and he may be removed from his trust by the surrogate for incompetency, or for wasting the real or personal estate of his ward, or for any misconduct in relation to his duties as guardian. (2 R. S. 152, §§ 14, 15, 16.)

As the same power "to allow and appoint guardians" is, by the statute, conferred on the surrogate that is possessed by the supreme court, as successors of the court of chancery, it would seem that the guardianship of the person may be granted to one, and that of the estate to another person. This was often done by the late court of chancery. In such a case the statute is complied with, if security be taken only from the guardian of the estate, as was done in similar cases by the court of chancery. (2 *Kent's Com.* 227.) And the surrogate has, doubtless, the same jurisdiction where the estate of the infant is very extensive, to allow of security in a fair sum only, as was done by the court of chancery in such cases. (*In matter of Hedges*, 1 ed. Ch. R. 57. *In the matter of Frits*, 2 *Paige*, 374.) We have seen, in a previous chapter, that the surrogate may, in certain cases, appoint the New York Life and Trust Company guardian of the estate of infants without exacting security. In such a case the guardian of the person will be a different person, with such power over the estate as the surrogate may give in the letters of guardianship; and the security to be exacted from him should be measured with reference to the estate of the infant put under his control, rather than by the entire estate of the infant.

With regard to the duties as well of a guardian in socage, as of every other guardian, whether testamentary or appointed, the statute has well summed them up, by declaring that he shall safely keep the things that he may have in his custody belonging to his ward, and not make or suffer any waste, sale or destruction of such things or of such inheritance, but shall keep up and sustain the houses, gardens and other appurtenances to the lands of his ward,

been clothed with that jurisdiction; which he must have, if he can allow an infant of fourteen to ignore the control of his father, or appoint a guardian for one still younger, against the remonstrances of a living father.

by and with the issues and profits thereof, and with such other moneys belonging to his ward, as shall be in his hands, and shall deliver the same to his ward, when he comes to his full age, in as good order and condition, at least, as such guardian received the same, inevitable decay and injury only excepted; and he shall answer to his ward for the issues and profits of real estate received by him, by a lawful account. (2 R. S. 153, § 20.)

The general principles which regulate the rights and duties of guardians form an important part of our equity jurisprudence. They have frequently been discussed at the bar, and expounded from the bench. We have room only to state a few of these principles with a reference to the adjudged cases. The guardian cannot trade with himself, on account of his ward, nor buy or use his ward's property for his own benefit. All advantageous bargains which he makes with the ward's funds, enure to the benefit of the ward at his election. He cannot convert the personal property of his ward into real estate, or buy land with the ward's money. If he does so, his ward, when he comes of age, will be entitled, at his election, to take the land or the money, with interest. (*White v. Parker*, 8 Barb. S. C. R. 48. *Reeve's Dom. Rel.* 325 *et seq.*)

The policy of the doctrine that the guardian cannot, without the intervention of a court of equity, change the property of the ward, from real to personal, and *vice versa*, is ably questioned by the late Chief Justice Reeve, (*Reeve's Dom. Rel.* 334;) and he shows that some of the reasons on which it is founded do not exist in this country. It is, however, a well settled principle in our jurisprudence. (*White v. Parker*, *supra*. *Genet v. Talmadge*, 1 J. Ch. R. 561. *Field v. Schieffelin*, 7 *id.* 154.) The statute (*first enacted in 1814, ch. 108,*) authorizing the chancellor, on a proper application, to direct the sale of the whole or a part of the real estate of infants for their maintenance and education, and which has since been enlarged and regulated, (2 R. S. 194. 3 *id.* 274, 5th ed.) is founded on the theory, that without legislative interference the guardian could not, at common law, sell the lands of his ward. It is well known, that prior to 1814, there were annually numerous applications to the legislature on this subject, and special acts were occasionally enacted, authorizing the sale of the real estates of infants. The general law has superseded

the necessity of such special legislation; and that was in part its object.

Although plausible reasons may be given for extending to the guardian the same power of disposition over the real as the personal estate of his ward, yet it is for the legislature and not the courts to make the innovation. The change of the infant's property from real to personal, and *vice versa*, interferes with his power to dispose of it by will. By the existing law, males at eighteen and females at sixteen may bequeath personal property; but neither can devise real estate, till they attain the age of twenty-one years.

A guardian may, however, sell the personal property of his ward for the purpose of the trust, without the order of the court; and a *bona fide* purchaser is not answerable for the application of the money (*Field v. Schieffelin*, 7 J. Ch. R. 154.)

But this right should be exercised for the benefit of the infant. He may lease the ward's land during his minority, and no longer. (*Pond v. Curtis*, 7 Wend. 45.) He should keep the moneys of his ward productive, and apply the interest only, if sufficient, to his maintenance and the proper expenditures of the trust. (*De Peyster v. Clarkson*, 2 Wend. 77. *Hopkins*, 424.) He should not support his ward in idleness, when he is capable of earning his own living. (*Clark v. Clark*, 8 Paige, 153.) But the means of support furnished him while he is obtaining his education, and preparing himself for future usefulness, are a proper allowance to the guardian as necessities. (*Id.*)

The right of the guardian to dispose of the personal property of the ward is essential to the due execution of the trust. Without this power he could not make unproductive property yield a revenue. It is sometimes necessary to call in outstanding debts and to reinvest them. In this as well as in the sale of the personal property of the ward, due regard should be had to the character of the estate, the social position of the ward, his age, and the nature and condition of his real estate, and his probable future occupation. It is not usual to sell family pictures, plate, watches, ornaments, &c., but to keep them (as they are not perishable in their nature) as memorials of their former proprietors. Should the ward be an heir to a well stocked farm and nearly of age, the

guardian would be justified in not selling this stock. (*Reeve's Dom. Rel.* 326.)

If the guardian omits to keep the money of his ward invested, or mixes it with his own, he is chargeable with simple interest, on the funds in his hands uninvested; and in gross cases of delinquency, with compound interest. (*De Peyster v. Clarkson, supra.*)

Most of the charges against executors and administrators are applicable to guardians; as both, indeed, act in a fiduciary capacity. A guardian is allowed his reasonable expenses, and the same rate of compensation for his services, as is provided by law for executors and administrators. (2 *R. S.* 153, § 22.) He is not entitled to commissions on investing, or receiving and reinvesting the funds of his ward, for the purpose of raising an income; but only upon the interest received and paid out by him. He is allowed half commissions for receiving and half for paying out the trust money; and when he only receives, or only pays out, he cannot charge for both. (*Matter of Kellogg*, 7 *Paige*, 265.)

The guardian has power to receive a legacy bequeathed to his ward, if above fifty dollars, under the direction of the surrogate, on giving such security as shall be required. His discharge of the same, on its being paid to him, in that character, will be a good voucher to the executor. He may, indeed, receive any money due to his ward, including legacies of any amount. He may submit to arbitration in behalf of his ward. (*Weed v. Ellis*, 3 *Caines' Rep.* 253.) He may in some cases purchase real estate at public sale for the benefit of his ward, (2 *R. S.* 105, § 27;) as where land is sold under an order of the surrogate; but he cannot in such cases purchase for his own benefit.

A guardian has a power coupled with an interest, and, therefore, if three persons be appointed guardians, and one dies, the guardianship survives. (*Eyre v. Countess of Shaftsbury*, 2 *P. Wms.* 103. *The People v. Byron*, 3 *J. C.* 53.)

When there are several joint guardians, the trust is joint and several. They are jointly responsible for joint acts, and each is solely responsible for his own acts and defaults, in which the other did not participate. When one of several guardians acts alone,

and misapplies the property of his ward, or fails in any thing which is his several duty, he alone is responsible for his own misconduct. (*Kirby v. Turner, Hopkins*, 330, *per Sanford, Ch.*)

The surrogate has no jurisdiction over a guardian appointed by the supreme court, or a testamentary guardian. He has no power in this respect, except what is conferred by the statute, which is exclusively confined to guardians appointed by himself. (*Matter of Dyer*, 5 *Paige*, 534.)

SECTION II.

Of the appointment of guardian, and in what way it is made.

The practice of the late court of chancery and present supreme court, in appointing guardians, does not fall within the scope of this treatise.

We shall speak of testamentary guardians, and guardians appointed by the surrogate.

1. Of testamentary guardians. Before the statute 12 Charles 2, c. 24, a father was permitted, by the general custom within the province of York, to commit, by his last will and testament, the tuition of his child and the custody of his person, for a time ; which testament and assignation was to be confirmed by the ordinary, who also was to provide for the execution of the same testament. If the father died without making the appointment, the power devolved on the mother, who was authorized, by her last will and testament, to appoint a tutor for her minor children ; and if no tutor be assigned by either of the parents, a stranger, if he made the orphan his executor, and gave him his goods, might assign a tutor for him, with respect to such goods ; which tutor was to be confirmed by the ordinary. *Swinb.* 210. 2 *Burn's E. L.* 536, *quarto ed.*)

The statute 12 Charles 2, which was substantially re-enacted in this state, controled in some respects the custom of York, and made the rule universal. None but the father can appoint such guardian. Nor does the making the orphan executor, or legatee, or both, confer the authority to make such guardian, on a stranger or a relative. In this state it has been held that even the grand-

father has no right, under the statute, to appoint by will a guardian for his grandchild. (*Fullerton v. Jackson*, 5 J. Ch. R. 278.)

No particular form of words is prescribed to make the appointment valid. It is enough if the meaning appears. Wherefore, if the testator say, I commit my children to the power of such an one; or I leave them in his hands; it is in effect as if the testator had said, I make him tutor to my children. So it is if he say, I leave them to his government, regimen, administration, or the like. (*Swinb.* 216. 2 *Burn's E. L.* 539, *quarto ed.* *Corrigan v. Kiernan*, 1 *Bradf.* 208.)

An appointment by deed or by will is in effect the same thing, as either instrument is ambulatory and revocable till the death of the party making it. In a case where the father gave the guardianship of the infant to one by deed and to another by will, it was decreed that the will was a revocation of the deed.

The statute allows the father, though a *minor*, to make a testamentary guardian. In analogy to the age at which males are capable of making a will of personal property, it is presumed that he must be of the age of eighteen years or upwards in order to make a valid testamentary appointment of a guardian. It is usual to have the will making the appointment admitted to probate, though the appointment derives its force from the will or deed, rather than from the probate.

The surrogate's court, we have seen, has no jurisdiction over testamentary guardians, either to call them to account, remove them, or direct them in their proceedings. The subject is no further material to that officer, than to know, that if there be a valid testamentary appointment of a guardian, made by the father, the surrogate is ousted of jurisdiction. (*Matter of Dyer*, 5 *Paige*, 534.)

The testamentary guardian stands on the same footing of other trustees, and may be called to account, directed in his conduct, or removed from office by the supreme court, in a proper case. (*Willard's Eq. Juris.*, 423, 470.)

2. Of the appointment of guardians of the person and estate by the surrogate. This is a power, we have seen, not existing at common law, and which has been conferred on the surrogate's court since the commencement of the present century. It is not, like the

power formerly enjoyed by the court of chancery, and now by the present supreme court, a general power, but is limited to certain specified cases.

The provisions of the statute are substantially as follows: If the minor is above the age of fourteen years, and no guardian has been appointed for him by the deed or will of his father, he may apply, by petition, to the surrogate of the county where the residence of the minor is, for the appointment of such guardian as the minor may nominate, subject to the approval of the surrogate. (2 R. S. 150.) The surrogate, however, is not bound by this nomination, and may, if the choice is an injudicious one, refuse to approve it. Under the former statute, (1 R. L. 454,) which was the same in this respect as the present, the supreme court held that the surrogate had no other power to appoint a guardian for a minor over fourteen years of age, than to allow such guardian as might be chosen by the minor. (*Sherman v. Ballou*, 8 Cowen, 304.) If the minor, therefore, did not choose a guardian, the surrogate could appoint none.

The proceedings to appoint a guardian are commenced by a petition, in writing, addressed to the court; and it should set forth enough to give jurisdiction, and such other facts as are important to guide the discretion of the court. It should, therefore, set forth the name, age and place of abode of the minor, the death of his father, without having appointed any guardian by deed or will, the amount of his personal property, and the value of the rents and profits of his real estate, and the name, age and addition of the person nominated by the minor for his guardian. It should be subscribed by the minor, and his signature, if not made in open court, should be verified by an affidavit; and the truth of the other facts, set forth in the petition, should be attested in like manner. The surrogate is required, in all cases, to inquire into the circumstances of the minor and ascertain the amount of his personal property, and the value of the rents and profits of his real estate; and for that purpose he may compel any person to appear before him and testify in relation thereto. (2 R. S. 151, § 6. *Foster v. Mott*, 3 Bradf. 409. *Brown v. Lynch*, 2 id. 214. And see App. 109, as to form of petition.) It is not usually necessary to resort to testimony *dehors* the petition, unless there be a contest about the guardianship.

The petition should be accompanied with the written consent of the person nominated as guardian, to act in that capacity, if appointed. The execution of this instrument should be regularly verified by affidavit. The surrogate should also inquire into the suitableness of the person proposed as guardian, as well as into the circumstances of the minor. The testimony should be reduced to writing and subscribed by the witnesses. (*Bennett v. Byrne*, 2 Barb. Ch. 216. App. 110, 111.)

On filing the petition and other papers, the surrogate, if he intends to grant the application, should enter an order in the minute book directing the appointment of the person nominated as such guardian, on his executing a bond to the minor with sufficient security to be approved of by the surrogate, in a penalty double the amount of the personal estate, and of the value of the rents and profits of the real estate, conditioned that such person will faithfully, in all things, discharge the duty of a guardian to such minor, according to law, and that he will render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship, in all respects, to any court having cognizance thereof, when thereunto required. The statute has not directed the number of sureties to be required. That matter is left to the sound discretion of the surrogate. The amount of property, the age of the minor and the character of the parties, are all proper to be considered in forming a judgment on this subject.

If there are more minors than one, uniting in the same application, a bond should be taken to each, separately; and they should be proved or acknowledged before a proper officer, as is required of deeds preparatory to recording them. (*L. of 1833, ch. 271, § 9. 3 R. S. 690, 5th ed. L. of 1851, ch. 175, § 3.*) A bond taken to all the minors would doubtless be available to each; but the enforcing it might sometimes be attended with inconvenience. In like manner, where several persons are appointed guardians for one minor, each guardian may give a separate bond, or they may all join in the same bond, jointly and severally to their ward. (*Kirby v. Turner*, 1 Hopkins, 309. App. 113.)

On producing the bond, duly executed, to the surrogate, a further order should be entered in the minutes, approving of the bond and directing the appointment to issue. The appointment should run

in the name of the people and be tested in the name of the officer by whom it is issued, under his seal of office. It is, moreover, required to be recorded in a book to be provided for that purpose. (App. 115.)

Since the law of 1837, *ch.* 460, (3 *R. S.* 247, 5th *ed.*) every general guardian appointed by the surrogate is required annually, after his appointment, so long as any part of the estate or the income or proceeds thereof remain in his hands, or under his control, to file in the office of the surrogate appointing him, an inventory and account, under oath, of his guardianship, and of the amount of property received by him and remaining in his hands, or invested by him, and the manner and nature of such investments, and his receipts and expenditures in form of debtor and creditor. By subsequent sections of the same act, the surrogate is required to annex to and deliver, with the appointment of a general guardian made by him, a copy of the preceding section, and to file in his office all accounts and inventories before mentioned; and in the month of February, in each year, he is to examine all such accounts and inventories as shall have been filed in his office for the preceding year. If on such examination he shall be satisfied in any case that the interest of the ward requires that a more full and satisfactory account should be given, or that such guardian should be removed, or in case any guardian shall neglect to file such account and inventory for three months after the same should have been filed, such surrogate shall proceed against such guardian in the manner prescribed in the 14th section of title 3, chapter 8, of the 2d part of the revised statutes, and sections 15, 16, 17, 18 and 19 of said title shall extend to proceedings authorized by this section. But the surrogate may discontinue such proceedings on such guardian filing in his office an account and inventory satisfactory to him, and on payment of all costs which may have accrued in consequence of such neglect. The foregoing sections and the practice under them will be noticed in the following section of this chapter.

If the infant is under the age of fourteen years, any relative or other person in his behalf may apply to the surrogate of the county where the infant resides, for the appointment of a guardian,

until he shall arrive at the age of fourteen years, and until another guardian shall be appointed. (2 *R. S.* 151, § 5.)

The application should be by petition, in writing, setting forth the names, ages, and residence of the infants, the death of their father, without having appointed any guardian by deed or will; the probable value of the personal property of the infants, and the rents and profits of the real estate; the names and places of abode of the relatives of the infants, especially of those residing in the county; and conclude with the prayer for the appointment of some person named in the petition, as guardian of the infants. The facts stated in the petition should be verified by affidavit. On filing the petition the surrogate should assign a day for the hearing of the matter, and cause such notice thereof to be given to such of the relatives of the infants as he shall direct. (2 *R. S.* 151, § 5, *as amended by act of 1837, ch. 460, § 44.* 3 *R. S.* 243, 244, 5th ed.) An order for the above purpose should be entered in the minutes.

The consent of the proposed guardian should be subjoined to the petition, unless the petitioner asks for his own appointment.

The notice should be in writing, subscribed by the petitioner, and should specify the time and place of hearing, the names of the infants for whom the application is made, and the name, place of abode and addition of the person proposed as guardian. On receiving an affidavit of the regular service of the notice, the surrogate should proceed to inquire into the circumstances of the infants, and ascertain the amount of their personal property, and the value of the rents and profits of their real estate. For this purpose, as in the former case, he may compel any person to appear before him and testify in relation thereto. The testimony should be reduced to writing. [App. 116 to 120.]

In this stage of the proceedings there are often important questions as to the party entitled to be appointed guardian for the infant. The former statute did not require notice of the application; and hence, in some instances, persons not of kin, and perhaps unsuitable persons for such a charge, received the appointment. The attention of the chancellor was called to this point in 1824, in the case of *Morehouse v. Cook*, (*Hopkins*, 226.) In that case the chancellor held that as between an uncle and a stranger, other things being equal, the uncle was to be preferred. Though

notice was not required by the act then in force, yet the chancellor thought notice should be given to the relatives in the state, when the application was by a stranger to the infant. The revisers in 1830 provided not only for notice, but they directed the order of preference; first, to the mother of the minor; second, to the grandfather on the father's side; third, to the grandfather on the mother's side; fourth, to either of the uncles on the father's side; fifth, to either of the uncles on the mother's side; sixth, to any one of the next of kin to the minor who would be entitled to a distribution of his personal estate, in case of his death. This provision was repealed soon after. As the sixth section of the act gave the surrogate the same power to allow and appoint guardians in the cases over which he had jurisdiction, as the chancellor, the seventh section was superfluous. It, however, contains an unequivocal implication, that no guardian can be appointed by the surrogate in the lifetime of the father of the infant. The order of preference is precisely that which the court would adopt in the absence of a statutory requirement, all other things being equal.

In making the selection of the guardian, the true interest of the infant is to be consulted, rather than the wishes or interests of those contending for the guardianship. The particular order of preference indicated above will afford a safe guide in ordinary cases; but it should not be paramount to other qualifications. Though the surrogate has a discretion in this matter, it is not an arbitrary, but a judicial discretion, and if erroneously exercised it may be corrected on appeal. (*White v. Pomeroy*, 7 Barb. S. C. R. 640. *Bennett v. Byrne*, 2 Barb. Ch. R. 216.)

The declared wishes of the deceased parents of an infant, in relation to the manner in which he should be brought up, and as to whose care he should be committed during his infancy, are entitled to much weight in deciding upon the claim of the different relatives to the guardianship of the infant. (*Underhill v. Dennis*, 9 Paige, 203.)

After deciding in favor of the application, an order should be entered in the minutes appointing the applicant, on entering into the bond with sufficient sureties. The order, bond and appointment will be the same as on the appointment of a guardian for a minor, and which have already been noticed.

SECTION III.

Of the removal of guardians by the surrogate; accepting their resignation; and of their accounting before the surrogate.

By the former statute of this state, it has been seen, that although the surrogate had the power of allowing and appointing guardians, in certain cases, yet he had no jurisdiction over them as trustees, or authority to remove them for misconduct, or accept their resignation of the trust, for any reason, however urgent. The power, in all these respects, belonged exclusively to the court of chancery. (*Matter of Andrews*, 1 J. Ch. R. 99. *Ex parte Crumb*, 2 id. 439. *Disbrow v. Henshaw*, 8 Cowen, 349.)

If it was safe to entrust the power of appointment of guardians for infants to the surrogates of the different counties, under the limitations contained in the act, experience soon taught us that that there could be no danger in conferring upon the same officer the power of removal, of accepting a resignation of the trust, and of compelling and settling the accounts of the guardianship.

Accordingly, by the revised statutes of 1830, the surrogate by whom any guardian was appointed was empowered to remove him from his trust, on the application of any ward, or of any relative in his behalf, or of the surety of the guardian, for the following causes: 1. For the incompetency of such guardian: 2. His wasting the real or personal estate of his ward: or 3. Any misconduct of the guardian in relation to his duties as such. (2 R. S. 152, § 14.) By another provision of the revised statutes, it was enacted that a person sentenced to imprisonment for life was deemed to be civilly dead; and a sentence to the state prison for a term of years, worked a forfeiture of all public offices and all private trusts, authority or power during the term of such imprisonment. (2 R. S. 701, §§ 19, 20.) It would, doubtless, also be evidence of such misconduct, as to justify his entire removal from the office.

It was found that the revised statutes did not cover the whole ground; and hence the statute of 1837, ch. 460, contained suitable provisions: 1. for the removal of a guardian, when his sureties have become insolvent, and have removed or are about to remove from

the state, or from any cause they have become insufficient, and the guardian neglects, when required, to give further sureties: and 2. for granting liberty to the guardian to resign his trust. (*Laws of 1837, ch. 460, §§ 46, 51. 3 R. S. 246, 5th ed.*)

The proceedings for the *removal* of the guardian are the same in all cases. A petition should be presented to the surrogate, setting forth the facts on which the application is founded, duly verified by affidavit, and asking the aid of the surrogate in the premises. On filing it, an order should be entered in the minute book, directing a citation to issue to the guardian to appear before the surrogate at a certain day and place, to show cause why he should not be removed from his guardianship. (*2 R. S. 152.*)

This citation must have at least fourteen days between the test and return; and must be served personally on the guardian to whom it is directed, at least fourteen days before the return thereof. If the guardian has absconded or concealed himself so that he cannot be personally served, it may be served by leaving a copy thereof at the last place of residence of the guardian. (*Id.*)

On the return of the citation, and after receiving evidence of its due service or publication, as the case may be, the surrogate should proceed to inquire into the alleged complaint. For this purpose subpoenas may be issued to compel the attendance of witnesses; and the hearing may be adjourned from time to time. If the surrogate is satisfied from such examination of the incompetency or misconduct of the guardian, he is authorized to remove him from his trust, by an order to be duly entered in his minutes. A revocation of the original appointment, under the seal of the court, should be issued and served on the guardian. The revocation should run in the name of the people, and be tested in the name of the officer by whom it is issued. It should be recorded in the same book with the original appointment. (*2 R. S. 222.*)

The general causes for which a removal may be made, are sufficiently detailed in the statute. Fixed habits of intemperance have been held to be a sufficient reason for the removal. (*Kettletas v. Gardner, 1 Paige, 488.*) Though the surrogate has no jurisdiction over a chancery guardian, the chancellor formerly, and now the supreme court, have jurisdiction over a guardian appointed

by the surrogate to remove him, accept his resignation, or compel him to account. (*Matter of Dyer*, 5 Paige, 534.).

Whenever the surrogate shall have issued a citation to a guardian requiring him to show cause why he should not be removed from office, he is empowered to enter an order *enjoining* such guardian from further acting in the premises, until the matter in controversy shall be disposed of. (*Laws of 1837*, ch. 460, § 61.) The proceedings in obtaining an injunction order are similar to those in analogous cases in the supreme court. The petition should state facts enough to authorize it, and they should be sworn to by the applicant for the order, or by some other person having the requisite knowledge, and the petition should pray for such order. (*See Willard's Eq. Juris*, ch. 6, *Injunction*, p. 341 *et seq.*) An injunction should be granted only where the rights sought to be protected are clear, or at least free from reasonable doubt. (*Snowden v. Noah*, *Hopkins*, 347.) It should be issued only where the injury is pressing and delay dangerous. (*New York P. and D. Establishment v. Fitch*, 1 Paige, 97.)

It remains, under this head, to consider the practice on accepting the resignation by the guardian of his trust. The application for this purpose must be made by the guardian. The causes which will justify a guardian in resigning his trust must be such as to satisfy the surrogate that the interest of the ward will not suffer by the change, and that the resignation proceeds from good and proper motives of the guardian. Thus, should the guardian be about to remove out of the state, or be engaged in business which renders his discharge of the duties of the office impracticable, or should his health or capacity for business become seriously impaired; these and perhaps various other causes may be a good ground for accepting his resignation.

Before this resignation can be accepted, the surrogate is required to issue a citation to the ward, requiring him to show cause, at a time and place therein to be appointed, why the guardian should not be permitted to resign his trust. The citation must be served on the ward, by delivering him a copy, at least ten days before the return day. Notice of the proceedings should also be given to the next of kin of the ward, if there be any, of the age of discretion, in

the county of the surrogate. (*L. of 1837, ch. 460, § 52. 3 R. S. 247, 5th ed.*)

On the return of the citation and proof of the service, the surrogate is required to appoint some discreet and proper person to appear and attend to the interests of the ward in the premises, who shall consent, in writing, to such appointment. Any other, who shall desire to do so, may also appear in behalf of the ward. (*Id. § 53.*) The guardian is then to proceed to render to the surrogate a full, just and true account, in writing, of all his receipts and payments on account of the ward, and of all the books, papers, moneys, choses in action and other property of the ward, which may be in the hands or under the control of the guardian, and to verify the same by his own oath and such other evidence as shall be satisfactory to the surrogate. (*Id. 54.*) If the surrogate shall be satisfied that the guardian has, in all respects, conducted himself honestly in the execution of his trust, that he has rendered a full, just and true account, and that the interest of the ward would not be prejudiced by allowing the guardian to resign his trust, he may thereupon proceed, in the mode prescribed by law, to appoint a new guardian for such ward, and order that his former guardian deliver over all the books, papers, moneys, choses in action or other property of the ward to such new guardian, and take duplicate receipts for the same. (*Id. § 55. Seaman v. Duryea, 1 Kern. 324.*)

On delivering one of the said receipts to the surrogate to be filed in his office, the surrogate may enter an order that the former guardian, on his own application, be permitted to resign his trust, and that he be thereupon discharged from any further custody or care of the ward or of his estate. But the ward, or his new guardian, is not precluded, by this accounting, from having a further account from such former guardian, in relation to all matters connected with his trust, before he was permitted to resign the same; and in relation to all such matters, the sureties of the former guardian remain liable in the same manner and to the same extent as though such order had not been made. (*Id. § 56.*)

As any person interested in the allowance or appointment, or removal of a guardian, as next of kin, or otherwise, and any guardian who may have been removed by any surrogate, may appeal to the supreme court, within six months after any order shall have

been made by the surrogate, for the appointment of a guardian, or for his removal or refusing to make such removal, it is expedient that the testimony should, in all these examinations, be reduced to writing.

Upon the removal of a guardian, a new one may be appointed by the surrogate as if none had ever been appointed. (2 *R. S.* 153, § 17.)

In conclusion, under this section, a few words will be added on the subject of *compelling* guardians to account before the surrogate, and of the *voluntary* accounting by such guardians. This matter is regulated by statute. On the application of the ward, or of any relative of such ward, and on good cause being shown, the guardian may be compelled to account, at any time, in the same manner as an administrator. On arriving at age, the ward may compel an account before the surrogate without showing any cause. (2 *R. S.* 152, § 11.) But neither can call the administrators of a deceased guardian to account before the surrogate. The remedy in such a case is in equity, before the supreme court. (*Farnsworth v. Oliphant*, 19 *Barb.* 30. *Matter of Van Wyck*, 1 *Barb. Ch.* 565.)

The practice heretofore considered, with regard to compelling administrators and executors to account, will, in general, apply to this case. Obedience to an order to account, and to a decree directing the guardian to pay a sum of money in his hands, and the like, may be enforced by attachment, or by docketing the decree and taking out execution, or by an action on the bond of the guardian. (2 *R. S.* 222. *Doran v. Dempsey*, 1 *Bradf.* 490. *Seaman v. Duryea*, 1 *Kern.* 324.)

The proceedings to compel guardians to account, when the application is by the ward or a relative, and the proceedings on the part of the guardian *voluntarily* to render and settle his accounts, are presented to the surrogate by petition in writing. Citations are to be issued and served on the parties entitled to notice as in proceedings to remove guardians. The attentive student can easily frame the proceedings from those in other cases which have been considered.

The allowances to be made to guardians for commissions and ex-

penses are the same as those allowed to executors and administrators. The surrogate is to file the accounts, and to record with his decree a summary statement of the same as shall be finally settled and allowed by him, which shall be referred to and taken as part of the final decree. (*Laws of 1837, ch. 460, § 2. 3 R. S. 365, 5th ed. See ante, p. 428 et seq., as to accounts of executors and administrators, and Appendix as to forms Nos. 123 to 128.*)

CHAPTER VII.

OF ADMEASUREMENT OF DOWER.

Executors, administrators and guardians have, in general, nothing to do with the subject of dower. That is a matter between the widow and the heirs. The right to dower, however, sometimes incidentally arises in the administration of the estates of deceased persons, and it is expressly provided, in the last subdivision of the first section of the statute defining the jurisdiction of surrogates' courts, (2 *R. S.* 220,) that they shall have power, amongst other things, to cause the admeasurement of dower to widows. It will not, therefore, be inappropriate to the subject of our treatise to describe the nature of this estate; the remedies to enforce the right; and more especially, the jurisdiction of the surrogate's court, in the premises.

The general rule with regard to the right of the widow to dower, as it is declared by statute, is, that she shall be endowed of the third part of all the lands whereof her husband was seised of an estate of inheritance, at any time during the marriage. (1 *R. S.* 740, § 1.) There are three things, therefore, necessary to consummate the right; marriage, seisin of the husband of an estate of inheritance, and death of the husband.

At common law the remedy of the widow was either by the writ of right of dower, or the writ of dower *unde nihil habet*. In either case this was a real action, the proceedings in which were complicated, dilatory and expensive. On recovering judg-

ment, she was entitled to the writ of *habere facias seizinam*, under which the sheriff was required to set off to her in severalty, by metes and bounds, where practicable, the one third of the estate of inheritance of which her husband was seised during the coverture, according to the effect of the recovery. Before such recovery, the widow had a *mere right* to dower, which was incapable of alienation so as to vest in the assignee a right of action. (*Jackson v. Aspell*, 20 John. 411. *Sutliff v. Forgey*, 1 Cowen, 89. *S. C. affirmed* 5 *id.* 713.) She might, indeed, release it to the person having a greater estate, but could not transfer it to a stranger; and such is the rule now.

The common law remedy of the widow has been abolished; and if her dower is not voluntarily assigned, she may proceed by an action in the supreme court, either in the nature of a bill in equity or in the nature of an ejectment, or by petition to the supreme court, county court of the county where the lands lie, or to the surrogate of the same county, for the admeasurement of her dower under the statute. (2 *R. S.* 488.) Prior to the code, courts of equity had concurrent jurisdiction with courts of law, in suits for the recovery and assignment of dower. (*Badgley v. Bruce*, 4 *Paige*, 98.) If the facts be properly stated in the complaint, the cause will be decided now upon the same principles as formerly.

If the dower be admeasured under the statute, and possession is not surrendered to the widow, she must still resort to an action in the supreme court, in the nature of an ejectment, to obtain the enjoyment of her right. (*Borst v. Griffin*, 9 *Wend.* 307. *Parks v. Hardey*, 4 *Bradf.* 15. *Jackson v. Randall*, 5 *Cowen*, 168.) The statute makes no provision for trying the title before the surrogate, and the admeasurement is conclusive only as to the location and extent of the part to which the widow is entitled, after her right is admitted, or established. The defendant, notwithstanding the admeasurement, may still contest the legality of the widow's right.

It is obviously not within the scope of this treatise to discuss the general question as to the right of dower, or the various remedies to recover it. A brief exposition of the practice before the surrogate, on an application for admeasurement of dower, is all that

will be attempted. The reader is referred to the various treatises on the practice of the supreme court, for the mode of proceeding, the statutory remedy being the same in all the courts. (*Crary's Practice on Special Proceedings*, 1.)

A widow whose dower has not been assigned to her, within forty days after the decease of her husband, if she intends to apply for the admeasurement of it to the surrogate of the county, where the lands lie, must present her petition in writing, to that officer, within twenty years after the death of her husband, unless at the time of such death she was an infant, insane, or imprisoned on a criminal charge. (2 *R. S.* 488, § 1. 1 *R. S.* 742.)

The petition should state the marriage, seisin and the death of the husband, and particularly specify the lands to which the widow claims dower; whether the husband died seised thereof, or aliened the same in his lifetime, the names of the persons owning the said lands claiming a freehold estate therein, and their places of abode, and whether the same are of full age or infants, the names of the occupants of the lands, and concluding with a prayer for the admeasurement of the dower of the widow, and for the appointment of commissioners for the purpose of making such admeasurement. (See Appendix, No. 129.)

If any of the owners of the land are infants and have no guardian, the surrogate, on the application of the widow, must appoint some discreet and substantial freeholder a guardian of such infants for the sole purpose of appearing for and taking care of their interests in the proceedings. (2 *R. S.* 488, § 4.) The practice in making such appointment, is similar to that pursued in the like cases, on an application for the sale of real estate, except in this instance no notice is in any case required to be served on the infant preparatory to making the appointment.

A copy of the petition, with notice of the time and place when it will be presented, must be served, at least twenty days previous to its presentation, upon the heirs of the husband; or, if they are not the owners of the lands subject to dower, then upon the owners of such lands claiming a freehold estate therein, (*Ward v. Kilts*, 12 *Wend.* 137,) or their guardians, where any such heirs or owners are minors, whether the minors reside in the state or not. (*Id.* § 5.)

Such notice may be served personally on any party of full age;

or upon the guardian of minors ; or by leaving the same with any person of proper age, at the last residence of such party or guardian, in case of his temporary absence ; and if any such heir or owner be a resident out of this state, the service may be upon the tenant in actual occupation of the lands, or if there be no tenant, by publishing the same for three weeks successively, in some newspaper printed in the county where such lands are situated. (*Id.* § 3.)

On the day specified in the notice, if the same has been regularly served, the surrogate, *upon the hearing of the parties*, may order that admeasurement be made of such widow's dower of all the lands of her husband, or of such parts thereof as shall have been specified in such application. (*Id.* § 9.) (App. 131, 132.)

With regard to the matters which may properly be put in issue on this hearing before the surrogate, there is some diversity of opinion. The owners of the land out of which dower is claimed, are obviously entitled to be heard before the surrogate on the appointment of the commissioners. It would seem also, on principle, that any objection might be raised and decided, affecting the jurisdiction of the court, as that the husband is still living, and the like. (*Jackson v. Totten*, 20 *J. R.* 411.)

On making the order for admeasurement, the surrogate should appoint three reputable and disinterested freeholders commissioners for the purpose of making such admeasurement, by an order which shall specify the lands of which dower is to be admeasured, and the time at which the commissioners shall report. (*Id.* § 10.)

The commissioners are required to be sworn, before entering on their duties, that they will faithfully, honestly and impartially discharge the duties and execute the trust reposed in them by such appointment. (*Id.* § 11.) The oath may be taken before the surrogate or a judge or clerk of any court of record, or commissioner to take affidavits. (App. 133.)

On the death, resignation or refusal to serve of any commissioner, others may be appointed in their places, by the surrogate, for the time being, and they must be sworn in like manner. (*Id.* § 12. *Gale v. Edsall*, 8 *Wend.* 460.)

The commissioners are required to execute their duties as follows :

1. To admeasure and lay off, as speedily as possible, the one-third part of the lands embraced in the order for their appointment as the dower of such widow, designating such part with posts, stones or other permanent monuments :

2. In making such admeasurement they are to take into view any permanent improvements made upon the lands embraced in said order, by any heir, guardian of minors, or other owners since the death of the husband of such widow, or since the alienation thereof by such husband ; and if practicable, to award such improvements within that part of the lands not allotted to such widow, and if not practicable so to award the same, they are to make a deduction from the lands allotted to such widow, proportionate to the benefit she will derive from such part of the said improvements as shall be included in the portion assigned to her :

3. They are to make a full and ample report of their proceedings, with the quantity, courses and distances of the land admeasured and allotted by them to the widow, with a description of the posts, stones and other permanent monuments thereof, and the items of their charges to the court by which they were appointed, at the time specified in the order for their appointment :

4. They are to employ a surveyor with necessary assistants, to aid them in such admeasurement. (*Id.* § 13.)

The commissioners cannot inquire whether the husband has made a settlement on his wife in lieu of dower. (*Hyde v. Hyde*, 4 *Wend.* 630.) Though, in general, dower is to be assigned by metes and bounds, yet where the subject matter does not admit of such division, she may be entitled to one-third of the profits. (*White v. Storey*, 2 *Hill*, 544.) If the land was aliened by the husband during the marriage, she is entitled to dower only in one-third of the value at the time of alienation, and no more. (*Walker v. Schyler*, 4 *Wend.* 480.) (App. 134, 135.)

The surrogate has power to enlarge the time of making the report, to adjourn the proceedings from time to time ; to compel the commissioners to make a report ; to discharge the commissioners neglecting to make a report ; and to appoint others in their places, as often as may be necessary. (2 *R. S.* 490, §§ 14, 16.) The report, when made, must be filed and entered at large in the book provided for that purpose. (*Id.* § 15. 2 *R. S.* 222, § 7.)

The foregoing observations relate to the proceedings when the application is made by the widow. The statute, however, extends to a case where the widow neglects to apply, and the proceedings are conducted on the motion of the heirs or owners of the freehold. It was this class of cases that was mainly contemplated by the act of 1806. (1 *R. L.* 60.)

On this branch of the subject the revised statutes contain the following provisions: "After the expiration of forty days from the death of any husband, his heirs, or any of them, or the owners of any land subject to dower, claiming a freehold estate therein, or the guardian of any such heirs or owners, may, by notice in writing, require the widow of such husband to make demand of her dower, within ninety days after service of such notice, of the lands of her deceased husband, or of such part thereof as shall be specified in such notice." (2 *R. S.* 489, § 6.) If such widow shall not make her demand of dower, within the time specified in such notice, by commencing a suit, or by an application for admeasurement, as herein prescribed, or if such widow shall not make such demand within one year after her husband's death, although no notice to that effect shall have been given; the heirs of the husband of such widow, or any of them, or the owners of any land subject to dower, claiming a freehold interest therein, or the guardian of any such heirs or owners, may apply, by petition, to the supreme court or to the county court of the county where such land is situated, or to the surrogate of the same county, for the admeasurement of the said widow's dower of the lands of her husband, or of such part thereof as shall be specified in the said petition. A copy of such petition, with notice of the time and place of presenting the same, shall be served personally on such widow, twenty days previous to its presentation. (*Id.* §§ 7 and 8.) The subsequent proceedings are in all respects the same as where the application is originally made by the widow.

We now proceed to notice the proceedings before the commissioner, and before the surrogate, on an application to set aside their report.

As the commissioners derive their authority from the appointment, it is obvious they have no power to decide on questions rela-

tive to the widow's title, but must make their admeasurement in conformity to the order of the surrogate. Thus, where the surrogate ordered one third of certain premises to be set off, it was held that the commissioners had no right to confine their admeasurement to one sixth, upon the ground that the husband was entitled only to one undivided half of the land. (*Coates v. Cheever*, 1 *Cowen*, 460.)

Though the statute is silent as to giving notice of the time when the commissioners will meet, to make their admeasurement, it would seem, on principle, that a reasonable notice should be given to the parties to be affected by their decision. (*Matter of Watkins*, 9 *John*. 245.)

In making their assignment, the commissioners have the same power as a sheriff under an execution upon a judgment in dower; and accordingly are not confined to the mere measuring off by metes and bounds, but may assign dower in mines wrought during coverture, or the like. (*Coates v. Cheever*, *supra*.) In such cases the examination of witnesses will often become indispensable, and yet no adequate provision is made for that purpose.

If no objection is made to the report, and the proceedings of the commissioners appear to be fair and correct, it is pretty much of course to confirm it. If, however, either party is dissatisfied with it, and desires to have it set aside, he should give notice to the other party or parties to be affected by the decision, of his intended application to the surrogate, for that purpose; which notice should be accompanied with copies of the papers on which the motion is founded.

The costs and expenses arising on any proceedings under the statute, before the surrogate, are to be taxed by him, and in case no appeal is entered, the said costs and expenses are to be paid equally, the one half thereof by the widow and the other half by the adverse party. (2 *R. S.* 492, § 25.)

The costs, however, of a motion to set aside the report of the commissioners rest, it is presumed, in the discretion of the court, and are to be awarded under its general power as to costs to the party, in the judgment of the court entitled thereto, under a view of all the circumstances of the case. (2 *R. S.* 223, § 10.)

The widow and any heir or owner of lands affected by the pro-

ceedings, or the guardian of such heir or owner, may, within thirty days after the order of confirmation of the report of the commissioners, appeal from such order to the supreme court. This appeal must be filed with the surrogate, but is not effectual or valid for any purpose until a bond to the adverse party shall be executed by the appellant and filed with the surrogate, with security, to be approved by him, in the penal sum of one hundred dollars, conditioned for the diligent prosecution of such appeal, and for the payment of all costs that may be adjudged by the supreme court against said appellant. (2 *R. S.* 491, §§ 19, 20.)

It is the duty of the surrogate, when the appeal is perfected, on receiving the amount of his fees for the service, to transcribe the petition, affidavits, notices, orders, reports and all other proceedings on the said application, together with the said appeal, to certify them under his official seal, and to transmit the said copies to the supreme court.

The further proceedings on the appeal do not belong to this work, but will be found in the statute, and in books devoted to a consideration of the practice of the supreme court.

The admeasurement of dower is seldom conducted in the surrogate's court, and it is, in general, more advisable to have the whole proceedings carried on in the supreme court—a tribunal having jurisdiction coextensive with the whole subject, and with more ample means of doing justice to the parties.

APPENDIX OF FORMS.

No. 1.

FORM OF A WILL AND CODICIL, DEVISING REAL AND PERSONAL ESTATE.

[Ante, pp. 98, 112.]

In the name of God, amen. I, A. B., of the town of, in the county of and state of New York, aged years and upwards, and being of sound disposing mind and memory, do make and publish this my last will and testament, in manner following, that is to say:

First. I direct that my funeral charges, the expenses of administering my estate, and all my debts, be paid out of my personal estate; and if that be insufficient, I expressly charge the payment thereof, or of any deficiency, upon the real estate whereof I may die seised or possessed, and for that purpose I authorize my executors hereinafter named, to sell, at public or private sale, the whole or such part of my real estate as may be sufficient for that purpose.

Second. I give and bequeath to my beloved wife the sum of ten thousand dollars with interest from my death, in lieu of her dower and of any distributive share of my estate to which she might otherwise be entitled.

Third. I give and bequeath to my niece, C. D., of, &c., wife of, one thousand dollars, to be paid to her out of my personal estate, by my executors, for her separate use, and with power to dispose of the same at her death, by will or by an instrument in the nature of a will, notwithstanding her coverture with her present or any future husband. And I further direct, that if she should die during my lifetime, leaving issue, and any of her descendants shall be living at the time of my death, the said legacy shall not lapse; but the same shall be paid to such descendants by my executors, to wit: To all the children of the legatee, in equal proportions, if all her children shall then be living, or if none of them have died leaving issue at the time of my death. But if any of her children or descendants shall have died leaving issue, then such issue or descendants to take the share or part of such legacy which the parent of such issue or descendants would have taken by this will, if living at the time of my death.

Fourth. I give and bequeath to, infant son of, of, a legacy of one hundred dollars; and I authorize my executors, if

they shall deem it safe and prudent, to pay the said legacy to the father of the said infant, and take his receipt for the same, and his agreement to hold the same in trust for the said infant, to be paid to him when he becomes of age, with interest at the rate of five per cent.

Fifth. I give and bequeath to each of my brothers, F. and G., of, the sum of five hundred dollars, and I direct that in case either of my said brothers should die during my lifetime, his legacy shall not lapse, but shall go to the survivor, his executors, administrators, or assigns. And if both of my said brothers shall die during my lifetime, without issue or descendants, I then direct that the legacies herein bequeathed shall go to my executors for the general purposes of the will.

Sixth. I give and bequeath the ten shares of 100 dollars each, of stock which I now own in the Bank, situate at, &c., to my friend, of

Seventh. I give and devise to my beloved wife the dwelling house and lot in the village of, in which I now live, for and during her natural life; and from and after her death, I give and devise the same to my son, G. H., his heirs and assigns for ever.

Eighth. I hereby dispose of the custody and tuition of my infant children during their minority, and while they remain unmarried, to my beloved wife, so long as she remains my widow; but if she shall die or marry during the single life and infancy of any of said children, then and in that case I dispose of and commit their custody and tuition to my friend, of

Ninth. I give, devise and bequeath all the residue of my estate, real and personal, to my children, share and share alike, as tenants in common. In case any one of my children shall die in my lifetime, leaving issue or descendants, I direct that his share shall not lapse, but shall be paid [as in the 3d item.]

Tenth, and lastly. I appoint my friend, E. F., executor of this my last will and testament, hereby revoking all former wills by me made.

In witness whereof, I have hereto subscribed my name this day of, in the year one thousand eight hundred and fifty-nine.

A. B.

[NOTE. It is not necessary that a will should be under seal. It is good either way, with or without a seal.]

We, whose names are hereto subscribed, do certify that A. B., the testator, subscribed his name to this instrument in our presence, and in the presence of each of us, and at the same time he declared in our presence and hearing that the same was his last will and testament, and requested us, and each of us, to sign our names thereto as witnesses to the execution thereof, and which we have done accordingly, in the presence of the testator and of each other, the day of the date of the said will.

J. K., of the town of, county of

L. M., do do

Clause in a will or deed, limiting personal property to the separate use of a married woman.

I give and bequeath to A. B. and C. D., their executors, administrators and assigns, the sum of two thousand dollars, in trust, to receive the interest thereof during the joint lives of G. H. and E. F. his wife, and to pay the same to the said E. F. and her assigns, notwithstanding her coverture, for her sole and separate use, from time to time, during the joint lives of the said G. H. and E. F. his wife,^(a) so that the said E. F. shall not sell, mortgage, charge or otherwise dispose of the same in the way of anticipation.^(b) And if the said E. F. should survive the said G. H., her husband, then upon trust to pay the said principal sum of two thousand dollars to the said E. F., her executors, administrators or assigns; but in case the said E. F. should die in the lifetime of the said G. H., her husband, then in trust, after the decease of the said E. F. to assign and transfer the said sum of two thousand dollars to such person or persons, and in such shares, and subject to such conditions, as the said E. F. notwithstanding her coverture, by her last will and testament in writing, or by any writing in the nature of, or purporting to be, her last will and testament, should limit or appoint,^(c) and in default thereof, upon trust to pay, transfer and assign the same to the next of kin^(d) of the said E. F., their executors, administrators and assigns, according to the statute for the distribution of the effects of persons dying intestate.

Clause in a will, limiting real estate to the separate use of a married woman.

I give and devise to A. B. and C. D., the trustees, during the joint lives of E. F., and G. H. her husband, all that certain tract, piece or parcel of land, [here describe the same,] upon trust, to pay the rents, issues and profits there-

(a) If the clause were to stop here, E. F., the wife, would have power by virtue of the words "sole and separate use," of disposing of the entire of her life interest in this money, by what is termed a "sweeping appointment," notwithstanding the direction that the payment shall be "from time to time."

(b) As to the effect of this sentence, see *Clancey's Rights of Women*, pp. 329, 330.

(c) The object and operation of this clause is to prevent the wife from disposing of the principal sum, while she is subject to the influence of her husband, by an instrument which would take effect during her life; she is therefore restricted to a disposition by will, by which alone she can convey it, if she die during her coverture. But if she survive her husband, being then freed from the marital authority, it is given to her absolutely. (*Clancey's Rights of Women*, 306, 307. *Id.* 625, *App.*, from which the foregoing clause is taken.)

(d) This ultimate limitation to the next of kin of the wife, in the event of her dying in the lifetime of her husband, is introduced for the purpose of excluding him from any share in this money, if she should not bequeath it to him; for the husband is now held not to be the next of kin of his wife. (*Clancey's Rights of Women*, pp. 305, 306.)

of to the said E. F., or to such person or persons as she by writing should direct to receive the same, during the joint lives of the said E. F. and G. H., for her sole and separate use, so that the said E. F. shall not sell, mortgage, charge or otherwise dispose of the same in the way of anticipation. And from and immediately after the decease of the said G. H., her husband, in case the said E. F. should survive him, then to the said E. F., her heirs and assigns for ever; but in case the said E. F. should die in the lifetime of the said G. H., then to the use of such persons, for such estates and charges as the said E. F., by her last will and testament in writing, or by any writing in the nature of, or purporting to be, her last will and testament, in the presence of two witnesses, should direct, limit or appoint, and in default thereof, then to the use of L. M., his heirs and assigns for ever.^(e)

No. 2.

CODICIL.

This is a codicil to my last will and testament, bearing date the day of, 1859.

I give and bequeath to my niece C. D., wife of, two hundred and fifty dollars in addition to the legacy bequeathed to her in my said will, which sum is to be for her own use, and subject to her power of disposition, and not to lapse, and to be in all other respects like the said original legacy.

I nominate and appoint executor of my last will and testament, instead of E. T., who has recently departed this life. In witness whereof, &c.

[To be executed and attested like the original will.]

No. 3.

RENUNCIATION OF AN EXECUTOR.

[2 R. S. 70, § 8. Ante, p. 141.]

I, A. B., named as executor in the last will and testament of C. D., late of, deceased, do by these presents renounce the appointment of executor

(e) The plan of this instrument is similar to that of the preceding one. The object is to exclude the husband from all control over this property, during coverture, and even after his wife's death, unless she should think proper to devise it to him, according to her power. And to effect this purpose, a life estate is given to her in the rents and profits, for her separate use, with a power to her to dispose of the capital of the estate by will, if she should die during the coverture; and if she should survive her husband, the whole estate is her's absolutely. And, as if it were limited to her heirs, in the event of her dying during coverture, without having devised it, her husband, in such a case, would be tenant by the courtesy, it is upon the occurrence of that contingency, limited to a third person and his heirs, for the purpose of excluding the husband from such interest. (*Clancy's Rights of Women*, 526, 627, from which the foregoing, slightly altered, is taken. And see *Willard's Eq. Juris.* 416-419, 490 *et seq.*)

of the said will. In witness whereof, I have hereto subscribed my name this
day of, A. D. 18...

A. B.

In presence of us,

C. D.

E. F.

Washington County, ss: C. D., being duly sworn, saith that the foregoing renunciation was signed by A. B., in presence of this deponent and E. F., and this deponent and the said E. F. respectively subscribed their names thereto, as witnesses to the execution thereof.

Sworn, &c.

C. D.

No. 4.

ORDER ON FILING RENUNCIATION.

[Ante, p. 141.]

IN THE MATTER OF PROVING THE LAST
 WILL AND TESTAMENT OF,
 DECEASED.

} Dated,

On filing the renunciation of A. B., as executor of the last will and testament of, deceased, and the affidavit of the due execution thereof, it is ordered that the said renunciation be and the same is hereby entered, and that the same be recorded in the minutes of this court.

No. 5.

PETITION FOR CITATION ON PRESENTING WILL FOR PROOF.

[Laws of 1837, ch. 460. Ante, pp. 152, 154, 158, 174.]

To the surrogate of the county of

The petition of, respectfully sheweth:

That late, of the town of, in the county of, farmer, departed this life, at his residence in the said county, on the day of, last having first, as your petitioner is informed and believes, duly made and published his last will and testament, in which your petitioner is named as executor, and which he now offers for probate as the law directs; that the said will relates to *both real* and personal estate. That the said was, at the time of his death, an inhabitant of the said county of, and that he left him surviving a widow named, who is of full age, and who now resides at, in said county, and children, as follows, his heirs at law, to wit:

G. H., of, in said county, aged about 24 years.

L. M., of the same place, an infant, of the age of about 18 years, and who

has no guardian to the knowledge of your petitioner, [or, if such be the fact,] that he left no widow or children him surviving, and that upon diligent inquiry, the names and places of residence of his heirs at law cannot be ascertained' [or, if such be the fact,] that his heirs at law and next of kin, are, a brother of the deceased, who now resides at, in said county, and is of full age, and, a sister of the deceased, the wife of, of, in said county, of lawful age.

NOTE. The *next of kin* at the time of the death of the testator are to be mentioned, and if they are all dead, then the persons who have, by such death, become next of kin, at the time of the application.

Your petitioner is advised that the surrogate of the county of, has jurisdiction to take the proof of the said will, and to grant letters testamentary thereon, and your petitioner is desirous that the said will should be admitted to probate *and recorded as a will of real estate*, in pursuance of the statute in such case made and provided:

Your petitioner, therefore, prays that a guardian ad litem be appointed for the said infant, for the sole purpose of taking care of his interest in the premises, and that a citation may in due form be issued, out of and under the seal of the said surrogate's court, to be directed to the proper persons, pursuant to the said statute, requiring them, and each of them, at such time and place as shall be in the said citation mentioned, to appear and attend the probate of the said will, and that such further and other proceedings may be had for proving and recording said will and the granting probate and letters testamentary thereon, as they shall be advised are necessary and proper. And your petitioner will ever pray, &c.

(Signed,)

No. 6.

JURAT.

State of New York, }
Saratoga County, } ss.

On this day of, 1859, before the undersigned, surrogate of the county of, personally appeared the above named petitioner, who being by me duly sworn, did say that he had read [or heard read] the foregoing petition by him subscribed, and knew the contents thereof, and that the same was true of his own knowledge, except as to the matters therein stated to be on his information and belief, and as to those matters he believed it to be true.

Surrogate.

[If the will only relates to *personal* estate, omit the words in italics in the petition.]

No. 7.

CONSENT TO BE APPOINTED AND TO SERVE AS SPECIAL GUARDIAN.

[Ante, pp. 152, 158.]

Surrogates' Court.—..... *County, ss:*

IN THE MATTER OF PROVING THE LAST	}
WILL AND TESTAMENT OF,	
LATE OF, DECEASED.	

I,, of, do hereby consent to be appointed by the surrogate of the county of, special guardian for, an infant heir of, deceased, for the sole purpose of taking care of the interests of the said infants in the matter of proving the last will and testament of the said deceased, and I consent to serve as such guardian.

Dated, (Signed,)

No. 8.

ORDER APPOINTING SPECIAL GUARDIAN.

[Ante, pp. 152, 158.]

At a surrogate's court held in and for the county of, at the surrogate's office in said county, on the day of, 1859, Present,, *Surrogate*.*

IN THE MATTER OF PROVING THE LAST	}
WILL AND TESTAMENT OF,	
DECEASED.	

It appearing from the petition of, propounding for probate the last will and testament of, late of, deceased, that, one of the heirs at law of the said deceased, [or next of kin.] is an infant under the age of twenty-one years, having no general guardian; and on reading and filing the consent of to be appointed and to serve as such guardian, for the sole purpose of appearing for, and taking care of, the interests of the said infant in this matter, it is ordered that the said be, and he hereby is, appointed the special guardian for the said, to take care of his interests in this matter.

* A formal caption, as above, is only necessary to the copy of an order issued by the surrogate. The entry in the minute book should contain the title of the cause, and the date of its being entered.

No. 9.

ORDER FOR CITATION.

[Ante, p. 152.]

Title. (*As in No. 8.*)At, &c., (*As in No. 8.*)

On reading and filing the petition of, duly verified, propounding the last will and testament of, late of, deceased, for probate, it is ordered that a citation issue to the proper persons, pursuant to the prayer of the petition, requiring them to appear in this court on the day of next, at 10, A. M., and attend the probate of the said will.

NOTE.—A will relating to personal estate may be admitted to probate without a citation, where the widow or next of kin are of full age, and such of them as are not executors, waive the necessity of a citation. Such waiver should be by a stipulation in writing. The petition will be modified, as well as the order for proof.

No. 10.

CITATION TO PROVE WILL.

[Ante, pp. 152, 154.]

The people of the state of New York, by the grace of God, free and independent:

To A. B., of, C. D., of, &c., [naming each of the persons and stating their place of residence; if any are minors, specifying their guardians by name, and stating their place of residence. If the name or place of abode of any person who ought to be cited cannot be ascertained, such fact should be stated in the citation; if a female heir or next of kin be married, the name of her husband as well as her own must be stated.]

Whereas,, of the town of, in said county, have lately applied to our surrogate of our county of, for proof of the will of, late of, deceased, which will relates to both real and personal estate: Therefore, you and each of you, are cited and required to appear at the office of the said surrogate, in the, in said county, on, at ten o'clock, A. M. of said day, to attend the probate of said will.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereto affixed. Witness, surrogate of the county of [SEAL], at the surrogate's office in said county, the day of, in the year of our Lord,

Surrogate.

NO. 11.

PROOF OF SERVICE OF CITATION.

[Ante, p. 153.]

County of, ss: A. B., of, in said county, being duly sworn, saith, that he did, on the day of, 1859, serve the annexed citation on the following named persons mentioned therein, to wit:, by delivering to each of them, respectively, a copy thereof, [or otherwise state the mode of service.]

Sworn, &c.

(Signed.)

ADMISSION OF SERVICE.

I,, admit due service of the within citation, this day of, 1859.

(Signed.)

No. 12.

SUBPENA FOR WITNESSES.

[Ante, p. 48.]

County of

The people of the state of New York, by the grace of God, free and independent:

To, Greeting:

We command you, and each of you, that all business and excuses being laid aside, you and each of you, personally be and appear before our surrogate of our county of, at his office in, on the day of next, at 10 A. M., to testify and give evidence in the matter of proving the last will and testament of, late of, deceased, now pending before our said surrogate;† and for a failure to attend you will be deemed guilty of a contempt of court, and be responsible to the aggrieved party for the loss and hindrance sustained by such failure, and for all other damages sustained thereby, and will forfeit to such aggrieved party fifty dollars in addition to such damages.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereto affixed. Witness,, surrogate of our said [L. s.] county, at the surrogate's office in said county, the day of, in the year of our Lord, one thousand eight hundred and fifty-nine.

(Signed.)

No. 13.

FORMS OF DEPOSITIONS OF WITNESSES PROVING WILL AND PROOF
OF CUSTODY.

[Ante, pp. 165, 172.]

Surrogate's Court—Saratoga County.

IN THE MATTER OF PROVING THE LAST	}
WILL AND TESTAMENT OF,	
LATE OF, DECEASED.	

County of Saratoga, ss: A. B., of, in said county, being duly sworn and examined before C. A. W., surrogate of the county of Saratoga, doth depose and say, that he was acquainted with, the testator named in an instrument now produced and offered to the said surrogate, purporting to be the last will and testament of the above named, bearing date; that this deponent, on or about the day of last, received the same from the said immediately after the execution thereof by the said testator, and the same has remained in the custody of this deponent until deposited with the surrogate for probate, and that while the said instrument remained in the custody of this deponent, it has been in no respect altered or changed.

(Signed.)

Sworn, &c.

No. 14.

DEPOSITIONS OF THE SUBSCRIBING WITNESSES.

[Ante, pp. 165, 172.]

Surrogate's Court—Saratoga County.

IN THE MATTER OF PROVING THE LAST	}
WILL AND TESTAMENT OF,	
LATE OF, DECEASED, AS A	
WILL OF REAL AND PERSONAL ES- TATE.	

Saratoga County, ss: A. B., of, in said county, being duly sworn and examined before C. A. Waldron, surrogate of the said county, deposeth and saith, that he was well acquainted with, in his lifetime, and was present and saw the said subscribe his name at the end of the instrument in writing now produced and shown to this deponent, bearing date the day of, purporting to be the last will and testament of the said, deceased. That the said, at the time he so subscribed

it, declared the said instrument to be his last will and testament, and requested this deponent and to subscribe their names as witnesses to the execution thereof. Thereupon this deponent and the said, in obedience to said request, accordingly subscribed their names as witnesses at the end of the said instrument, in the presence of the said, testator, and of each other. This deponent further saith, that the said, at the time he so executed the said will, was a citizen of the United States, an inhabitant of the county of Saratoga, of full age, of sound disposing mind and memory, in all respects competent to devise real estate, and not under any restraint, or in any respect incompetent to devise real estate, to the knowledge or belief of this deponent.

Sworn, &c.

(Subscribed.)

[The deposition of the other subscribing witness will be the same, *mutatis mutandis*.]

No. 15.

SUBPŒNA DUCES TECUM.

[Ante, p. 48.]

[Same as No. 12 to the †, and then as follows:] And also, that you bring along with you an instrument in writing, said to be in your custody or under your power and control, purporting to be the last will and testament of, late of, deceased, *and also the codicil thereto*. [Also modify the subsequent part, so that it may be read on failure to attend and produce such will.] You will, &c.

No. 16.

ORDER TO BE ENTERED IN THE MINUTES, PREVIOUS TO ISSUING THE SUBPŒNA.

[Ante, p. 51.]

Title. (As in No. 8.)

On motion of, ordered that a subpœna issue for, as a witness in this matter on the part of, and *that he be required to bring along with him the will of, deceased*.

NOTE. The proceedings to enforce obedience to the subpœna by attachment, and for the examination of foreign witnesses by commissioners, are similar to the corresponding proceedings in courts of record.

No. 17.

ORDER ADMITTING WILL TO PROBATE AND RECORD.

[Ante, p. 159.]

*Title. (As in No. 8.)**Title. (As in No. 8.)*

On filing the citation heretofore issued in this matter, and returnable the day of, and due evidence of the proper service thereof on all the proper parties to this proceeding, it is ordered that, executor named in an instrument, in writing, offered by him for probate and record, as the last will and testament of, late of, deceased, bearing date the, day of, have leave to proceed to the proof of the said supposed will. Whereupon the heirs [or next of kin, &c.] appear by, their counsel, [or fail to appear, as the case may be.] And hereupon, subscribing witnesses to the said instrument, in writing, were sworn and examined, [and divers other witnesses, if such was the fact,] and due deliberation being thereupon had; and it appearing, upon the proof taken, that the the said will was duly executed; that the said testator at the time of executing it was of full age for making a will, of sound disposing mind and memory, and not under restraint, and was in all respects competent to devise real estate; and the said surrogate being satisfied of the genuineness and validity of the said will: Whereupon, on motion of C. S. Lester, Esq. of counsel for the executor, it is ordered, adjudged and decreed, and the said surrogate by virtue of the power vested in him, doth order, adjudge and decree, that the said last will and testament was duly executed, that the same is genuine and valid, and that the same, together with the proofs and examinations taken in respect to the same, be recorded; that the said last will and testament be admitted to probate, and that the same be, and hereby is, established as a will of real and personal estate.

And it is further ordered, that letters testamentary issue thereon to the executors on their taking the oath required by law, provided no valid objection thereto is filed with the said surrogate.*

No 18.

ORDER FOR LETTERS TESTAMENTARY.

[Ante, p. 160.]

*Title. (As in No. 8.)**Title. (As in No. 8.)*

The last will and testament of, late of, deceased, having been admitted to probate on the day of last, and no objections having been exhibited, [or the objections having been heard and overruled, as

*See 3 R. S. 154, § 2, 5th ed.

the case may be,] and A. B. the executor named in the said will having taken the oath required by law, [*and executed with two sureties, a bond, &c., where bail is required,*] it is ordered that letters testamentary forthwith issue to the said executor.

No. 19.

OATH OF EXECUTOR.

[Ante, p. 161.]

County of Saratoga, ss: I, A. M., do swear, that I will faithfully and honestly discharge the duties of executor of the last will and testament of . . . , late of . . . , deceased, according to the best of my knowledge and ability.

A. M.

Sworn, &c., before

., *Surrogate.*

No. 20.

CERTIFICATE TO BE ENDORSED ON THE WILL.

[Ante, p. 160.]

County of Saratoga, ss: Be it remembered, that on the day of the date hereof, the last will and testament of . . . , late of . . . , deceased, (being the foregoing written instrument) was duly proved before C. A. W., surrogate of the said county, according to law, as and for the last will and testament of the real and personal estate of the said deceased; which last said will and testament and the proofs and examinations taken thereon, are duly recorded in this office.

In testimony whereof, the surrogate of the said county hath hereunto
[L. S.] set his hand and affixed his seal of office the . . . day of . . .
18. . .

Surrogate.

No. 21.

FORM OF PROBATE.

[Ante, pp. 145, 160.]

[A correct copy of the will with the following certificates.]

County of Saratoga. }
Surrogate's Office, } *ss.*

Be it remembered, that on the day of the date hereof, the last will and testament of . . . , late of . . . , deceased, bearing date the . . . day

of, of which the foregoing is a true copy, was duly proved before C. A. W., surrogate of the said county, according to law, as and for the last will and testament of the real and personal estate of said deceased; which said last will and testament, and the proofs and examinations taken thereon, are recorded in this office.

[L. s.] In testimony, &c. as in No. 20.

County of Saratoga. }
Surrogate's Office, } ss.

Be it remembered, that on the day of the date hereof, letters testamentary were duly granted to, sole executor of the last will and testament of, late of, deceased, he having first duly taken and subscribed an oath faithfully and honestly to discharge the duties of executor of the said will.

[L. s.] In testimony, &c. as in No. 20.

No. 22.

LETTERS TESTAMENTARY.

[Ante, p. 160.]

The People of the State of New York, by the grace of God, free and independent:

[L. s.] To all whom these presents shall come or may concern, send greeting.

Know ye, that at the town of, in the county of Saratoga, on the day of, one thousand eight hundred and, before, surrogate of our said county, the last will and testament of, late of, in said county, deceased,* was proved and is now approved and allowed by us; and the said, having been at or immediately previous to his death, an inhabitant of the county of Saratoga, by reason whereof the proving and registering of said will, and the granting administration of all and singular the goods, chattels and credits of the said testator, and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning his will, is granted unto, executor in the said will named, he being first duly sworn

* At this point, some surrogates are in the habit of adding, (a copy whereof is hereunto annexed,) and to attach the letters testamentary to a copy of the will. Although this will not vitiate the letters, it is not required, and is contrary to correct usage. The probate and the letters testamentary are different documents, and should be kept separate. [See the text, pages 145, 160.]

faithfully and honestly to discharge the duties of such executor according to law.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness, surrogate of our [L. S.] said county, at, in said county, the day of, one thousand eight hundred and

Surrogate.

*County of Saratoga, }
Surrogate's Office, } ss.*

Recorded the preceding letters in book A. of letters testamentary, page, the day of A. D. 1859.

Surrogate.

No. 23.

AFFIDAVIT OF INTENTION TO FILE OBJECTIONS AGAINST THE GRANTING OF LETTERS TESTAMENTARY.

[Ante, p. 160.]

Surrogate's Court—County of Saratoga.

IN THE MATTER OF THE GOODS AND
CHATELS
OF, DECEASED.

Saratoga County, ss: A. B. of, in, being duly sworn, saith, that he is a legatee named in the last will and testament of, which has lately been admitted to probate by the surrogate of the said county, of which is executor named in said will; that he intends to file objections against the granting of letters testamentary thereof to the said, as executor, and is advised and believes that there are just and substantial objections to the granting of said letters to said executor.

Sworn, &c.

(Signed.)

No. 24.

Title. (As above.)

[Ante, p. 160.]

To the Surrogate of the County of

The undersigned, a legatee [creditor or widow] of the above named deceased, respectfully objects to the granting of letters testamentary to, executor named in the said will, for the following reasons:

First. For that the said is incompetent to execute the duties of his trust as an executor of said will, by reason of improvidence.

Second. For that the said is incompetent to discharge the duties of said trust, by reason of his habitual intemperance in the use of alcoholic drinks.

[Set out the various objections.]

(Signed, &c.)

Dated.

ORDER ON THE ABOVE.

Title.

On reading and filing the objections of to the granting of letters testamentary to, ordered that the said appear before the surrogate on, at, &c., and attend the inquiry into the said objections.

[The order allowing the objections, or dismissing them, can readily be framed from the above.]

No. 25.

APPLICATION TO REMOVE AN EXECUTOR, AFTER THE GRANTING OF LETTERS TESTAMENTARY.

[Ante, p. 234.]

To the Surrogate of the county of

The petition of, a legatee named in the last will and testament of, deceased, respectfully sheweth: That the above named lately departed this life, having first duly made and published his last will and testament, in which, amongst other things, he bequeathed to your petitioner a certain legacy of one hundred dollars, [or as the case is,] and appointed A. B. executor; that the said A. B. caused the said will to be admitted to probate in the surrogate's court of the county of, on or about, and letters testamentary thereon were granted to the said A. B. by the surrogate of the said county, on or about, as your petitioner is informed and believes; that the said A. B. has taken upon himself the burden of the execution of the said will, and has possessed himself of the personal estate of the deceased to a very considerable amount, as your petitioner is likewise informed and believes. And your petitioner further saith, that the said A. B. is in such precarious circumstances as not to afford adequate security for his due administration of the said estate; [or that he is about to remove from the state; or set forth other cause of complaint, according to the fact.] Your petitioner therefore prays that the said A. B. may be superseded; or for such other relief in the premises as the nature of the case may require; and for that purpose, that a citation may be issued to the said A. B., requiring him to appear before the said surrogate on a day and at a place to be therein inserted, to show cause why he should not be superseded. And your petitioner will ever pray, &c.

Jurat, as No. 6.

No. 26.

ORDER THEREON.

[Ante, p. 235.]

C. D. <i>vs.</i> A. B., EXECUTOR OF THE LAST WILL AND TESTAMENT OF, DECEASED.	}	Date.
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On filing the petition of the above named complainant, duly verified, setting forth [here recite the substance of the petition,] and praying for the aid of the surrogate in the premises, it is ordered that a citation issue to the said A. B., requiring him to personally be and appear before the surrogate, at his office, in, on, to show cause why he should not be superseded as such executor; and to abide by such order as shall be made by the surrogate in the premises.

No. 27.

CITATION IN PURSUANCE THEREOF.

[Ante, p. 233.]

The People, &c., to A. P., executor of the last will and testament of
 [L. s.], greeting:

You are hereby cited, personally to be and appear before our surrogate of our county of, at the surrogate's office in, on, to show cause why the letters testamentary on the last will and testament of, deceased, heretofore granted to you, should not be superseded, and to further do and receive what shall be adjudged by our said surrogate in the premises.

In testimony, &c.

Witness, &c.

No. 28.

ORDER TO SUPERSEDE.

[Ante, p. 235.]

C. D. <i>vs.</i> A. B., EXECUTOR OF, &c.	}	Date.
--	---	-------

On filing the citation heretofore issued in this matter and returnable here this day, and an affidavit of the due service thereof on the above defendant, and no one appearing to oppose, and the surrogate having heard the proofs and allega-

tions on the part of the complainant, [or, and the parties appeared by their counsel, and the surrogate having heard the proofs and allegations of the respective parties;] and it appearing to this court that the said A. B. has become incompetent, by law, to serve as executor, by reason of insanity, it is ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the letters testamentary, heretofore issued to the said A. B., on the last will and testament of, deceased, be superseded.

NOTE.—The foregoing order can be easily adapted to any case. If the application for a supersedeas is denied, the order can be modified accordingly.

No. 29.

SUPERSEDEAS.

[Ante, p. 235.]

The People of the state of New York, to all to whom these presents shall come or may concern, and especially to A. B., executor of the [L. s.] last will and testament of, late of, deceased, send greeting.

Whereas, by our letters testamentary lately issued by our surrogate of our county of, under his seal of office, bearing date the day of, the administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning his will, was granted unto you, the said, executor in the said will named, you having first taken and subscribed the oath required by law, and because it is sufficiently testified in our surrogate's court of our county of aforesaid, that *you have become incompetent by law to serve as such executor*, [or as the case is,] and the said court, after hearing the proofs and allegations of the parties respectively, has, by a certain decretal order, adjudged that the said letters testamentary so issued as aforesaid, be superseded: Now, therefore, be it known, that in pursuance of the said order of our said surrogate's court, and of the statute in such case made and provided, we have superseded, and by these presents do supersede the said letters testamentary; and we command you that you entirely cease from intermeddling with the administration of the goods, chattels and credits of the said deceased.

In testimony, &c.

Witness, &c.

NOTE.—The supersedeas should be recorded in the book for recording letters testamentary and of general and special administration.

No. 30.

ALLEGATION TO CONTEST PROBATE.

[Ante, p. 231.]

Washington Surrogate's Court: A. B., one of the next of kin of C. D., late of, deceased, alleges that heretofore, to wit, on, &c., and within one year from this day of exhibiting this allegation, a certain instrument in writing was admitted to probate by the surrogate of the county of, to wit, at, in said county, as and for the last will and testament of, deceased, and that letters testamentary thereon were afterwards, to wit, on, granted by the said surrogate to, an executor named in the said supposed will, [here set forth the names and ages of the legatees in the supposed will.] And the said A. B. further saith, that at the time the said supposed instrument in writing was subscribed by the said, in his lifetime, and also at the time the same was published and declared as and for his last will and testament, to wit, at, the said was not of sound disposing mind and memory, but on the contrary thereof, was of unsound mind, and altogether incapable of making a testamentary disposition of his affairs, [or otherwise, as the facts may be. The allegation may contain as many articles, corresponding to counts in a declaration, as may be deemed necessary, and may be concluded as follows:] and the said A. B. prays that the probate of the said supposed will may be revoked, and for that purpose that a citation may be issued to, named as executor in the said will, and to, named as legatees therein, requiring them to appear before the surrogate at a time and place therein to be appointed, to show cause why the probate of the said supposed will should not be revoked, &c.

No. 31.

ORDER ON FILING THE ALLEGATION.

[Ante, p. 231.]

<p>A. B., NEXT OF KIN OF, DE- CEASED, <i>vs.</i> C. D., EXECUTOR, AND E. F., G. H., &c., LEGATEES NAMED IN AN INSTRU- MENT IN WRITING, ADMITTED TO PRO- BATE AS THE LAST WILL AND TESTA- MENT OF THE SAID DECEASED.</p>	}	Date.
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On filing the allegation of A. B., above named, setting forth [here briefly recite the main charge of the allegation:] It is therefore ordered, that a cita-

tion issue to the above named defendants, executor and legatees named in said supposed will, requiring them to appear before the surrogate at, on, to show cause why the probate of the said supposed will should not be revoked.

No. 32.

CITATION THEREON.

[Ante, p. 231.]

The People of the state of New York, to C. D., executor, and E. F., G. H., &c., legatees named in an instrument in writing, admitted to [L. s.] probate by the surrogate of county, as the last will and testament of, deceased, greeting.

You are hereby cited personally to be and appear before our surrogate of, at, on, to show cause why the probate granted on an instrument in writing, purporting to be the last will and testament of, deceased, should not be revoked, and to do further and receive what our said surrogate shall have adjudged in the premises.

In testimony, &c.

Witness, &c.

No. 33.

ORDER FOR REVOCATION.

[Ante, p. 232.]

A. B. vs. C. D., E. F. &c.	}	Date.
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This cause having been brought to a final hearing on the pleadings and proofs therein, and after hearing counsel on the part of the respective parties, and it appearing to the surrogate from the proofs and allegations of the parties that the said, deceased, at the time of making the instrument in writing, admitted to probate by this court on the day of, as the last will and testament of the deceased, was of unsound mind and altogether incapable of making a will, [or as the facts may be:] it is therefore ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the probate heretofore granted by this court on the said instrument, as and for the last will and testament of the said, deceased, be, and the same is hereby annulled and revoked. And it is further ordered, that the revocation of the said probate be entered in the records of

this court and be duly attested, and that notice thereof be duly served on, executor in the said probate named, and be published for three weeks successively, in a newspaper printed in said county called

No. 34.

REVOCATION.

[Ante, p. 232.]

The People of the state of New York, to A. B., named as executor in a certain instrument in writing, heretofore admitted to probate by [L. s.] our surrogate of the county of, as and for the last will and testament of, deceased, and to all others whom it may concern, greeting.

Whereas, a certain instrument in writing was, on the day of, admitted to probate by the surrogate of the county of, as and for the last will and testament of, deceased; and whereas, afterwards, to wit, on the day of, one A. B., one of the next of kin of the said deceased, exhibited and filed in the office of the surrogate of the said county his allegations in writing against the validity of the said supposed will, [or against the competency of the proof of the said supposed will,] and did thereupon pray the aid of the said surrogate in the premises; and whereas the said surrogate did thereupon issue a citation under his seal of office directed to the said A. B., named as executor in the said supposed will, and to the legatees therein named, requiring them to appear before the said surrogate at a day now passed at his office in, to show cause why the probate of the said supposed will should not be revoked, which said citation was served in due form of law on the executor and legatees in the said supposed will named, and such proceedings were afterwards had thereupon in our said surrogate's court, before our said surrogate, that it was amongst other things ordered, adjudged and decreed by our said surrogate, that the probate of the said supposed will be annulled and revoked: Now, therefore, in pursuance of the said in part recited order or decree and of the statute in such case made and provided, we have annulled and revoked, and by these presents do annul and revoke the said probate of the said supposed will.

In testimony, &c.

In witness, &c.

NOTE.—As the revocation of the probate necessarily operates as a supersedeas to the letters testamentary or of administration with the will annexed, if they have been granted, it would seem it should be recorded in the book of letters testamentary, &c.

No. 35.

PROCEEDINGS TO COMPEL AN EXECUTOR TO ACCEPT OR RENOUNCE
THE OFFICE.

[Ante, p. 143.]

PETITION.

To the surrogate of the county of

The petition of respectfully sheweth:

That your petitioner is a creditor of, late of, deceased; that the said departed this life at, on or about the day of, as your petitioner is informed and believes, having first duly made and published his last will and testament, in which, amongst other things, A. B., of, is appointed executor; that the said executor on or about the day of, caused the said will to be admitted to probate by the surrogate of the said county, and although the said has not renounced the said office of executor, he has hitherto neglected to take the oath required by law and to receive letters testamentary on the said will, notwithstanding more than thirty days have elapsed since the said will was admitted to probate as aforesaid.

Your petitioner therefore prays, that the said A. B. may be required to appear and qualify as such executor, within such time as shall be appointed for that purpose, or in default thereof that he shall be deemed to have renounced the said appointment. And for that purpose, your petitioner further prays that a summons may be issued, under the seal of this court, directed to the said, thereby requiring him to appear before the said surrogate and qualify as such executor, within a certain time therein to be limited, or that in default thereof he may be deemed to have renounced the said appointment.

And your petitioner will ever pray, &c.

Jurat, as in No. 6.

(Signed.)

No. 36.

SUMMONS.

[Ante, p. 143.]

The People, &c., to A. B., named as executor in the last will and testament of, deceased, greeting.

You are hereby summoned personally to be and appear before our surrogate of our county of, on or before the day of, at ten o'clock A. M., at the surrogate's office in, to take the oath of office as executor of the last will and testament of the said deceased and receive letters testamentary thereon, [and to give bail if it has been required,] or in default thereof you will be deemed to have renounced the said appointment.

In testimony, &c.

Witness, &c.

No. 37.

ORDER DECREETING RENUNCIATION.

[Ante, p. 144.]

L. M. (the petitioner,) <i>vs.</i> A. B., EXECUTOR, NAMED IN THE LAST WILL AND TESTAMENT OF, DECEASED.	}	Date.
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On filing the summons heretofore issued in this cause and returnable here this day, and an affidavit of the due service thereof, on the above defendant, and the said defendant having neglected to appear and qualify as executor of the last will and testament, according to the tenor of the said summons, it is ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the said A. B., by reason of his said negligence, has renounced the appointment of executor as aforesaid.

No. 38.

ADMINISTRATION.

[Ante, p. 201.]

PETITION.

To the surrogate of the county of

The petition of A. B., of, respectfully sheweth:

That your petitioner is the widow of, late of, deceased. That the said departed this life at, in, on or about the day of, and that he was at or immediately preceding his death, an inhabitant of the said county. That no last will and testament of the said deceased has been found or discovered to the knowledge of your petitioner, and your petitioner believes that the said died intestate.

And your petitioner further sheweth that the probable value of the personal estate does not exceed the sum of \$1000, and your petitioner prays that letters of administration may be granted to her of the goods, chattels and credits of the said deceased.

And your petitioner will ever pray, &c.

Jurat, as in No. 6.

(Signed.)

No. 39.

ORDER FOR LETTERS.

[Ante, p. 202.]

IN THE MATTER OF THE ESTATE OF, DECEASED.	}	Date.
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On filing the petition of A. B., widow of the deceased, duly verified by affidavit, by which it appears that the deceased departed this life intestate, at, on, leaving the petitioner his widow, and possessed of personal property of the probable value of, and praying that letters of administration of the goods, chattels and credits of the deceased may be granted to her: It is ordered that letters of administration of the goods, chattels and credits of the said deceased be issued to the said on her taking the oath required by law, and entering into a bond to the people of this state in the penal sum of, with two sufficient sureties to be approved of by the surrogate, conditioned that the said shall faithfully execute the trust reposed in her as such administratrix, and obey all orders of the surrogate of the county of, touching the administration of the estate committed to her.

No. 40.

FORM OF ADMINISTRATION BOND.

[Ante, p. 202.]

Know all men by these presents: That we, A. B., of, widow, and E. F., of, and G. H., of, are held and firmly bound unto the people of the state of New York, in the sum of, to be paid to the said people; to which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals. Dated the day of, in the year of our Lord, one thousand eight hundred and

The condition of this obligation is such, that if the above bounden A. B. shall faithfully execute the trust reposed in her as administratrix of all and singular the goods, chattels and credits of, late of, deceased intestate, and also obey all orders of the surrogate of the county of, touching the administration of the estate committed to her, then this obligation to be void, else to remain in full force and virtue.

A. B. [L. s.]
 E. F. [L. s.]
 G. H. [L. s.]

Scaled and delivered in presence of
 M. W.

State of New York. }
Saratoga County, } ss.

On this day of, 1859, before me the undersigned, a commissioner of deeds of said county, personally appeared the above named A. B., E. F., and G. H., whom I know to be the persons respectively described in the foregoing bond, and respectively acknowledged that they executed the same.

X. Y., *Commissioner of Deeds.*

AFFIDAVIT OF JUSTIFICATION.

*County of Saratoga, ss:—*E. F., of, in said county, being duly sworn, saith, that he is a householder residing in the county of Saratoga, and is worth the sum of [the penalty of the bond] over and above all debts, liabilities and responsibilities.

Sworn, &c.

E. F.

A similar affidavit for the other surety.

[2 R. S. 190, § 148. Id. 77, § 42, and ante, p. 202.]

No. 41.

OATH OF OFFICE OF ADMINISTRATOR.

[Ante, p. 202.]

IN THE MATTER OF THE ESTATE OF, LATE OF, DECEASED.
--

I, A. B., do solemnly swear and declare, that I will, honestly and faithfully discharge the duties of administrator of the goods, chattels and credits of, deceased, according to law.

Sworn, &c.

A. B.

No. 42.

ORDER FOR LETTERS FINAL.

[Ante, p. 202.]

IN THE MATTER OF THE ESTATE OF, DECEASED.

} Date.

A. B., widow of the deceased, having taken the oath of office as administratrix, and having also, together with C. D. and E. F., her sureties, entered into a bond to the people of this state, in the penal sum of, and with such condition as is required by law, and in conformity to the former order in this matter, it is ordered that letters of administration of the goods, chattels and credits of the said deceased be forthwith issued to the said A. B.

No. 43.

[Ante, p. 202.]

LETTERS OF ADMINISTRATION.

The People of the state of New York, by the grace of God, free and independent:

To E. F., the widow of, late of, in the county of, [L. s.] deceased, send greeting.

Whereas, late of, departed this life intestate, being, at or immediately previous to his death, an inhabitant of the county of Saratoga, [or state according to the fact, as required by 2 R. S. 73, § 23, what will give jurisdiction,] by means whereof the ordering and granting administration of all and singular the goods, chattels and credits, whereof the said intestate died possessed, in the state of New York, and also the auditing, allowing and final discharging the account thereof, doth appertain unto us; and we being desirous that the goods, chattels and credits of the said intestate may be well and faithfully administered, applied and disposed of, do drant unto you, the said E. F., full power, by these presents, to administer and faithfully dispose of all and singular the said goods, chattels and credits; to ask, demand, recover and receive the debts which unto the said intestate, whilst living, and at the time of his death, did belong, and to pay the debts which the said intestate did owe, as far as such goods, chattels and credits will thereunto extend and the law require; hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said intestate, within a reasonable time, and return a duplicate thereof to our surrogate of our county of, within three months from the date of these presents; and if further personal property, or assets of any kind, not mentioned in any inventory that shall have been so made, shall come to your possession or knowledge, to make, or cause to be made, in like manner, a true and perfect inventory thereof, and return the same within two months after discovery thereof; and also to render a just and true account of administration when thereunto required; and we do, by these presents, depute, constitute and appoint you, the said E. F., administratrix of all and singular the goods, chattels and credits of the said, deceased.

In testimony, &c.

Witness, &c.

No. 44.

[Ante, p. 203.]

When the applicant is not entitled without a citation, the petition, in addition to the facts contained in the preceding form, will disclose the names of the widow and next of kin of the deceased, and whether they are minors or not.

No. 45.

ORDER FOR CITATION.

[Ante, p. 203.]

IN THE MATTER OF THE ESTATE OF, DECEASED.	}	Date.
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On filing the petition of A. B., a creditor of the deceased, setting forth, &c.: [here, as in the other form, recite the substance of the petition and the names of the next of kin, &c.] It is therefore ordered that a citation issue to the widow and next of kin of the said deceased, requiring them to appear before the surrogate of the county of, at, on, to take upon them the administration of the goods, chattels and credits of, deceased, or to show cause why letters of administration should not be granted to, who has prayed for the same as a creditor of the deceased; [and if the case requires it add:] and it is further ordered that a copy of the said citation be published once a week for six weeks successively in the state paper.

No. 46.

CITATION.

[Ante, p. 203.]

The People of the state of New York, to the widow and next of kin [L. s.] of, late of, deceased.

You are hereby cited personally to be and appear before our surrogate of our county of, at the surrogate's office in, in said county, on the day of, at ten o'clock in the forenoon of that day, to take upon you, or either of you, the administration of the goods, chattels and credits which were of the said, deceased: or to show cause why letters of administration should not be granted of the same to, who has prayed for the same as a creditor of the deceased.

In testimony, &c.

Witness, &c.

No. 47.

ADMINISTRATION WITH THE WILL ANNEXED.

[Ante, pp. 207, 211.]

If the will was not admitted to probate by the executor, and he has renounced, or has been summoned, and refused, &c., the widow and next of kin must be cited by the applicant for the letters to appear and attend the probate of the will and to show cause why letters of administration, with the will an-

nexed, should not be granted, &c. If the applicant is entitled to the letters, the latter clause may be omitted. The forms, on admitting to probate, may be easily modified so as to meet this case; and the ordinary forms of letters of administration may be easily adapted to special letters *durante minore etate*, &c., or *ad colligendum*, &c.

No. 48.

PETITION TO REVOKE LETTERS OF ADMINISTRATION.

[Ante, p. 234.]

To the surrogate of the county of

The petition of respectfully sheweth:

That on or about the day of, letters of administration of the goods, chattels and credits of, late of the town of, deceased, were granted to, as will more fully and at large appear by reference to the records of your court; that since that time, to wit, on or about the day of, the last will and testament of the said deceased has been discovered and admitted to probate by the said surrogate, and letters testamentary thereon have, in fact, been issued to, executor in the said will named, as by the said records will more fully appear.

Your petitioner therefore prays that the letters of administration granted as aforesaid, on account of the supposed intestacy of the said deceased, may be revoked.

And your petitioner will ever pray, &c.

(Signed.)

Jurat, as in No. 6.

No. 49.

ORDER FOR CITATION.

The citation order for revocation, and the revocation, can be readily framed from the corresponding order and process on obtaining revocation of probate. [See before Nos. 28, 29, 30 and 31.]

No. 50.

RENUNCIATION OF A WIDOW OR NEXT OF KIN.

[Ante, p. 203.]

I, A. B., widow [or next of kin, as the case may be.] of C. D. late of, deceased, do, by these presents, renounce all my right and title to letters of administration of the goods, chattels and credits of the said deceased.

Dated.

Witness,

G. H.

I. K.

(Signed,)

A. B.

Affidavit of the execution of it as in No. 3.

No. 51.

PROCEEDINGS TO TAKE INVENTORY.

[Ante, p. 249.]

ORDER FOR THE APPOINTMENT OF APPRAISERS.

IN THE MATTER OF THE ESTATE OF	}	Date.
....., DECEASED.		

On the application of, executor of the last will and testament of the above deceased, [or administrator of the goods, chattels and credits of the said deceased,] it is ordered that A. B., of, and C. D., of, be appointed appraisers of the personal estate of the deceased.

No. 52.

APPOINTMENT OF APPRAISERS.

[Ante, p. 249.]

The People of the State of New York, by the grace of God, free and [L. s.] independent, to A. B. and C. D., of, in the county of, send greeting.

Whereas,, executor of the last will and testament of, late of, in said county, deceased, has this day applied to the surrogate of the county of for the appointment of two disinterested appraisers of the personal estate of the said deceased, with a view to the making and returning an inventory thereof: Now, therefore, be it known that the said surrogate, in pursuance of the powers in him vested, and of an order of the said court, hath appointed, and by these presents doth appoint, you the said, appraisers, to estimate and appraise the personal property of the deceased, and to aid the said executor in making a true and perfect inventory of all the goods, chattels and credits of the said deceased.

In testimony, &c.

Witness,, Surrogate, &c.

NOTE. 2 R. S. §2, §§ 1, 2. Some surrogates merely give a copy of the order to the appraisers; but an appointment as above seems the preferable course.

No. 53:

OATH OF APPRAISERS, TO BE ANNEXED TO OR INCORPORATED IN THE INVENTORY.

[Ante, p. 249.]

County of Saratoga, ss: I,, of the county of aforesaid, appraiser duly appointed by the surrogate of the said county, do swear and

declare that I will truly, honestly and impartially appraise the personal property of, deceased, which shall be for that purpose exhibited to me, to the best of my knowledge and ability.

Sworn, &c.

(Signed.)

The same oath to the other appraiser, unless both are united in one.

No. 54.

NOTICE OF APPRAISAL.

[Ante, p. 250.]

To the legatees and next of kin of, deceased, residing in the county of

Take notice, that the executor of the last will and testament of, late of, deceased, with the aid of the appraisers for that purpose, duly appointed by the surrogate of said county, will, on the day of next, at nine o'clock A. M., at the late dwelling house of the said deceased, proceed to make an appraisement and inventory of all the goods, chattels and credits of the said deceased.

Dated.

(Signed,)

Executor.

[2 R. S. 82, § 4. Ante, page 250.]

No. 55.

INVENTORY.

[Ante, p. 248, *et seq.*]

A TRUE AND PERFECT INVENTORY of all the goods, chattels and credits which were of, late of, deceased, made by the executor of the last will and testament of the said deceased, with the aid, and in the presence of and, being duly appointed and sworn appraisers; containing a full, just and true statement of all the personal property of the said deceased which has come to the knowledge of the said executor, and particularly of all bank bills and other circulating medium belonging to the said deceased, and of all just claims of the said deceased against said executor, and of all bonds, mortgages, notes and other securities for the payment of money belonging to the said deceased; specifying the name of the debtor to each security, the date, the sum originally payable, the indorsements thereon, with their dates and the sum which, in the judgement of the appraisers, may be collectable on such security.

[Here set out the articles of the personal estate.

Specie,	\$100 00
Bank notes,	55 00
One bay horse,	100 00
One yoke oxen,	75 00
One bond against A. B., dated 1st April, 1870, conditioned to pay \$500, with interest, two years from date, on which are the following indorsements—[set them out;] on which bond there is now supposed to be due and collectable	400 00

Or, the said bond is not believed to be collectable, as the case may be.

At the close:]

The following articles are exempt from appraisement, to remain in the possession of the widow of the testator, pursuant to the statute. [Here give a list of the exempt articles. (3 *R. S.* 170, 5th ed.) The articles exempt, under the act of 1842, must not, in the aggregate, exceed \$150 in value. The family bible, family pictures and school books, used by or in the family, are specifically exempted, without reference to their value; the books forming part of the family library, which do not exceed \$50 dollars in value, are alone exempt. The other exemptions are limited as to quantity, but not as to value. Hence, if the forks, sugar dish, milk pot and tea pot are of silver, they may be set apart to the widow, as between her and the next of kin or legatees, and perhaps, also, as against creditors; but this has not yet been decided.]

No. 56.

CERTIFICATE OF THE APPRAISERS TO BE SUBJOINED TO THE
INVENTORY.

[Ante, p. 257.]

We whose names are hereto subscribed, appraisers appointed by the surrogate of the county of, having first taken and subscribed the oath herein inserted, do certify that we have estimated and appraised the property in the foregoing inventory contained exhibited to us, according to the best of our knowledge and ability, and that we have signed duplicate inventories thereof.

Dated.

(Signed.)

No. 57.

OATH OF EXECUTOR TO BE ANNEXED TO INVENTORY.

[Ante, p. 262.]

State of New York. }
Saratoga County, } ss.

A. B., of, in said county, being duly sworn, saith that he is the executor of the last will and testament of, late of, deceased,

and that the annexed inventory of the personal estate of the said deceased is in all respects just and true; that it contains a true statement of all the personal property of the deceased which has come to the knowledge of this deponent, and particularly of all money, bank bills and other circulating medium belonging to the said deceased, and of all just claims of the said deceased against this deponent, according to the best knowledge and belief of this deponent.

Sworn, &c.

(Signed.)

An inventory made and returned by an administrator is the same, *mutatis mutandis*; and when there are several executors or administrators who join in making and returning an inventory, the proceedings will be modified accordingly.

No 58.

PROCEEDINGS TO OBTAIN AN APPRAISEMENT OF THE GOODS, &c. OF
THE DECEASED, BEFORE THE ISSUING OF LETTERS TESTAMENTARY
OR OF ADMINISTRATION.

[Ante, p. 234.]

PETITION.

To the surrogate of the county of

The petition of respectfully sheweth:

That your petitioner is interested as a creditor in the estate of, late of, deceased, and deems it important that a correct valuation of the said estate should be made, before letters of administration thereon are granted, in order that adequate security may be taken for the faithful administration thereof. [If any special reason exists, set it out.]

Your petitioner therefore prays that a commission for the appraisement of the goods, chattels and credits of the said deceased be issued to some discreet persons, to be appointed by the surrogate, and that a monition issue against, and all others with whom any of the goods, chattels and credits of the deceased remain, that they exhibit or show them to the said appraisers at the time and place of the execution of the said commission.

And your petitioner will ever pray, &c.

Jurat, as in No. 6.

(Signed.)

No. 59.

ORDER FOR COMMISSION AND MONITION TO ISSUE.

[Ante, p. 247.]

A. B., [THE PETITIONER,] <div style="text-align: center;">vs.</div> E. F., [THE PERSON HAVING THE GOODS, &c.]	}	Date.
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On filing the petition of it is ordered that a commission for the appraisement of the goods, chattels and credits of, late of, deceased, be issued to G. H., I. J. and K. L., and for the inspection of the obligations, leases, and other writings and papers whatsoever, concerning the personal estate of the said deceased, at the house of the deceased or elsewhere, with continuation and prorogation of the time and place as shall be needful. And it is likewise ordered that a monition issue to the above named E. F. in special, and all others in general with whom any of the goods, chattels or credits of the deceased remain, that they exhibit the same to the said appraisers at the time and place of the execution of the said commission.

No. 60.

COMMISSION OF APPRAISEMENT.

[Ante, p. 247.]

The People of the state of New York, to G. H., I. J. and K. L., of, (l. s.) greeting.

Whereas, it is represented unto our surrogate of our county of, that, of, lately died intestate, leaving goods, chattels and credits within this state; and whereas, it is also represented that letters of administration have not been issued of the said goods, chattels and credits, and that the said goods, chattels and credits are in such a situation as to render it impossible for the widow and next of kin of the said deceased to make a true estimate of their value; and we, being desirous that a just appraisement and valuation of the said goods, chattels and credits may be made in order that the same may be certified to our said surrogate, that he may proceed in the premises without delay, do therefore command and direct you, the above named G. H., I. J. and K. L., forthwith to repair to the late dwelling house of the said deceased in, or elsewhere, wheresoever any of his goods, chattels or credits remain or be, on such day or days, with continuation and prorogation of the said time and place as shall be needful; and the said goods, chattels and credits to appraise, and a value thereon set; and we do hereby authorize you for that purpose to demand of any person who may have possession of

the same, inspection of the obligations, leases, and other writings, and books and papers whatsoever relative to the personal estate of the said deceased; hereby requiring you, or any two of you, the same goods, chattels and credits to reduce into a just and true statement and account with your appraisement of each and every article thereof, and the same, so made and valued, to return, under your hands and seals, or the hands and seals of any two of you, into the office of our surrogate of the county of without delay.

In testimony, &c.

Witness, &c.

No. 61.

MONITION.

[Ante, p. 247.]

The People of the state of, to, [the person in possession of the goods,] and to all others to whom these presents shall come or may concern, greeting.

We command you that you exhibit, really and with effect, to G. H., I. J. and K. L., who have been duly appointed by our surrogate of the county of to appraise the personal estate of, late of, deceased, by our commission for that purpose issued to them, all and singular the goods, chattels and credits of the said deceased, and also the bonds, leases and other writings and papers concerning the personal estate of the deceased, remaining or being with you or any of you, in order that the same may be appraised and put into an inventory; the same to be exhibited to the said commissioners on the day of next, at o'clock in the forenoon, at the house of; and this your are not to omit, on pain of law and of contempt.

In testimony, &c.

Witness, &c.

[NOTE. The inventory returned with this commission is certified by the appraisers, but not by the executors or administrators.]

No. 62.

PROCEEDINGS TO COMPEL THE RETURN OF AN INVENTORY AFTER THE APPOINTMENT OF EXECUTOR OR ADMINISTRATORS.

[Ante, pp. 262, 267.]

PETITION.

To the surrogate of

The petition of respectfully sheweth:

That letters of administration of the goods, chattels and credits of, deceased, were on or about the day granted by the sur-

rogate of to A. B., as your petitioner is informed and believes; that your petitioner is a creditor of the said deceased, and is desirous of ascertaining the nature and extent of his estate; that although more than three months have elapsed since the granting administration as aforesaid, yet no inventory of the goods, chattels and credits of the said deceased has yet been returned by the said

Your petitioner therefore prays that the said may be required, at a short day, to be appointed for that purpose, to appear before the said surrogate, and return an inventory of the goods, chattels and credits of the said deceased, or show reason why an attachment should not be issued against him.

(Signed.)

Jurat, as in No. 6.

No. 63.

ORDER FOR SUMMONS.

[Ante, pp. 262-267.]

IN THE MATTER OF THE ESTATE OF, LATE OF, DE- CEASED.	}	Date.
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On filing the petition of, setting forth that he is a creditor of the deceased, that A. B., administrator of the goods, chattels and credits of the said deceased, has omitted to return an inventory thereof, and praying the aid of the surrogate in the premises: it is therefore ordered that a summons issue, requiring the said administrator to appear before the surrogate at his office in on, then and there to return an inventory of the goods, chattels and credits of the said deceased according to law, or to show cause why an attachment should not be issued against him.

No. 64.

SUMMONS.

The People of the state of New York to A. B., administrator of the goods, [L. s.] chattels and credits of, deceased.

You are hereby summoned and required to appear before the surrogate of the county of, at the surrogate's office in said county, on the day of, at ten o'clock in the forenoon, then and there to return an inventory of the goods, chattels and credits of, deceased, according to law, or to show cause why an attachment should not issue against you.

In testimony, &c.

Witness, &c.

No. 65.

ORDER FOR COMMITMENT, AFTER APPEARANCE, ON REFUSAL TO RETURN INVENTORY.

[Ante, pp. 262-267.]

A. B. <i>vs.</i> C. D.	}	Date.
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The above named defendant, having appeared in obedience to the summons heretofore issued in this cause, and refused to return an inventory of the goods, chattels and credits of, deceased, as therein required, or to show any sufficient cause to the contrary, it is ordered, adjudged and decreed, on the application of the said A. B., that the said C. D. be committed to the common jail of the county of, there to remain until he shall return such inventory, or be thence discharged by due course of law; and it is further ordered that an attachment for that purpose issue against him directed to the sheriff of the said county, returnable on

No. 66.

ATTACHMENT.

[Ante, pp. 262 to 267.]

[L. s.] The People, &c., to the sheriff, &c., greeting.

Whereas, on the day of, by a certain decree made in our surrogate's court of our county of Washington, before our surrogate of the said county, at the town of, in a certain cause depending in our said court, wherein A. B. is complainant and C. D. executor of the last will and testament of, late of, deceased, is defendant, it was ordered, adjudged and decreed that the said be committed to the common jail of the county of, until he shall return to our surrogate's court of the said county, an inventory of the goods, chattels and credits of, deceased, or be thence discharged by due course of law, as by the said decree, remaining as of record in our said surrogate's court, doth and may more fully appear, the said having refused to return such inventory, although required so to do by an order and summons of our said surrogate's court: Now, therefore, in order that full and speedy justice may be done in the premises, we command you, that you take the body of the said, if he shall be found in your bailiwick, and him safely keep in your custody until he shall return such inventory, or until he shall be thence discharged by due course of law; and you are to make and return to our said surrogate's court

on, at, a certificate, under your hand, of the manner in which you shall have executed this our writ; and have you then there this writ.

In testimony, &c.

Witness, &c.

INDORSEMENT.

Title.

Attachment against C. D., executor &c. of, deceased intestate, for not returning an inventory of the personal property of the deceased.

(Signed,)

J. C. H., *Surrogate.*

No. 67.

[Ante, pp. 263 to 267.]

ORDER FOR REVOCATION OF LETTERS TESTAMENTARY,
[OR ADMINISTRATION.]

A. B. <i>vs.</i> C. D.	}	Date.
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An attachment having heretofore issued against the said C. D., committing him to the common jail of the said county until he shall return an inventory of the goods, chattels and credits of, deceased, and it appearing by the certificate of the sheriff of the said county, indorsed on the said attachment, that more than thirty days have elapsed since the said C. D. was committed to his custody, and the said C. D. having still neglected to return such inventory, it is ordered, adjudged and decreed that the letters testamentary heretofore granted to the said, on the last will and testament of the said deceased, be revoked; and it is further ordered that a revocation thereof, under the hand and seal of office of the said surrogate be forthwith issued.

No. 68.

REVOCATION.

[Ante, pp. 263 to 267.]

To C. D., executor of the last will and testament of, late of, [L. S.] deceased, and to all others whom it doth or may concern, greeting:

Whereas, on the day of, letters testamentary were duly issued to the said, as executor of the last will and testament of, late of, deceased, by the surrogate of the county of: And whereas, the said neglected to return an inventory of the goods, chattels and credits of the said deceased, within the time required by law, and

a summons was thereupon issued by the said surrogate, on the application of, requiring the said to appear before the said surrogate and return such inventory on a day now past, or show cause why an attachment should not be issued against him: And whereas, it has been sufficiently testified to our said surrogate that the said summons could not be served personally on the said, by reason of his absconding or concealing himself, [or, and whereas, the said summons was duly served on the said, personally, and the said omitted to return such inventory by the day therein appointed, and such proceedings were thereupon had in our said surrogate's court, that an attachment for not returning such inventory was duly issued against the said to the sheriff of the county of, by virtue of which the said has been imprisoned for thirty days and upwards in the common jail of the said county, during all which time he has neglected and still neglects to return such inventory:] Now, therefore, be it known, that in pursuance of an order of our said surrogate's court, and of the statute in such case made and provided, we have revoked, and by these presents do revoke the said letters testamentary, and all power thereby granted over the estate of the said deceased; and we command the said, executor, to desist and refrain from any further intermeddling with the said estate.

In testimony, &c.

Witness, &c.

No. 69.

ORDER TO ADVERTISE FOR CLAIMS.

[Ante, p. 294.]

Title. (As No. 8.)

Date.

On the application of, executor of the last will and testament of, late of, deceased, setting forth that more than six months have elapsed since letters testamentary on said will were issued to him as such executor, and that he is desirous of giving such notice to the creditors of the deceased to present their claims, as is authorized by law; it is ordered that the said executor insert a notice once in each week for six months in the Saratoga Republican and Sentinel, a newspaper printed in the county of Saratoga, and also in the state paper, requiring all persons, having claims against said deceased, to present the same, with the vouchers thereof, to the said executor, at his office in, in said county, on or before the day of next.

NOTICE TO CREDITORS.

Pursuant to an order of, surrogate of the county of, and according to the statute in such case made and provided, notice is hereby given to all persons having claims against, late of, deceased,

that they are required to exhibit the same with the vouchers thereof to the subscriber, the executor of the last will and testament of the said deceased, at his office in, in said county, on or before the day of next.

Dated,

(Signed,)

Executor.

NOTE.—The day must be at least six months from the day of the first publication of the notice.

No. 70.

AGREEMENT TO REFER A CLAIM.

[Ante, pp. 295, 296.]

Whereas John Doe has lately presented a claim to the executors of the last will and testament of Richard Roe, late of, deceased, the testator, for work, labor and services said to have been done and performed by the said John Doe for the said testator, in his lifetime, the justice of which claim is doubted by the said executor. It is thereupon agreed, in conformity to the statute in such case provided, by and between the said John Doe and the said executor, that the said matter in controversy be referred to, three disinterested persons, as referees, to hear and determine upon the same.

(Signed,)

Dated, &c.

By both parties.

APPROVAL OF SURROGATE.

I hereby approve of the three persons named as referees in the foregoing agreement.

Dated, &c.

Surrogate.

No. 71.

APPLICATION FOR PROOF OF A DEBT DUE FROM THE DECEASED TO AN EXECUTOR.

[Laws of 1837, ch. 460, § 37. 3 R. S. 175, 5th ed. 2 Bradf. R. 116. Ante, pp. 303, 317.]

To the Surrogate of the county of

The petition of, of, in said county, respectfully sheweth:

That he is the executor of the last will and testament of, late of, deceased; that the said will was admitted to probate by the surrogate of said county, on the day of last, and letters testamentary were issued to your petitioner on the day of last; and your petitioner has made and returned an inventory of the personal estate of the said

deceased, as the law directs, by which it appears that the assets of the said deceased, applicable to the payment of debts and legacies, amount to about the sum of ten thousand dollars: That at the time of the death of the said testator, he was indebted to your petitioner in the sum of five hundred dollars on a promissory note bearing date the day of, in the year, given by the testator to your petitioner for so much money lent and advanced by your petitioner, on the day of the date of said note to the said deceased, in his lifetime, and which note became due and payable on the day of last, together with the interest from the date of the date of the said note: That the amount now due due on the said note, of principal and interest, is: That no payment has ever been made upon the said note, nor are there any offsets against said note, or any other defense to the same, to the knowledge or belief of your petitioner.

Your petitioner further sheweth: That he has advertised, pursuant to the statute, for claims against said estate and none have been exhibited, and he believes that none exist save the one in favor of your petitioner; and your petitioner saith is a co-executor with your petitioner; that the only persons entitled to share in the distribution of the personal estate of the said deceased, are, his widow, and, his children, all of whom reside in, and are of full age, and to whom he has bequeathed, in various proportions, all his property.

Your petitioner therefore prays that the debt due to your petitioner may be proved to, and allowed by the said surrogate, and that he may be permitted to retain, out of the assets in his hands, enough to pay and satisfy the said debt, together with the costs of this proceeding; and for this purpose, he prays that a citation may issue out of and under the seal of this court, pursuant to the statute, to be directed to the persons above named, requiring them to appear before the surrogate and attend the proof of the said debt, at a time and place therein to be appointed.

And your petitioner will ever pray.

Dated.

(Signed.)

Jurat as in No. 6.

No. 72.

ORDER FOR CITATION.

[Ante, pp. 303, 317.]

IN THE MATTER OF THE ESTATE OF, LATE OF, DECEASED.	}	Date.
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On reading and filing the petition of, executor of the last will and testament of, deceased, setting forth that he has a claim against said

estate, and praying for a citation to the proper persons requiring them to attend before the surrogate on a day to be appointed, the proof of the said claim, ordered that a citation issue according to the prayer of the petition, returnable at the surrogate's office, on the day of, at ten o'clock A. M. And it is further ordered that the said citation be served on the persons to whom it shall be directed, at least fifteen days before the return day thereof.

No. 73.

CITATION ON THE ABOVE ORDER.

[Ante, p. 103.]

The People, &c., to, co-executor, and, widow, and [L. s.], children, and legatees, named in the last will and testament of, late of, deceased, send greeting.

You and each of you are hereby cited and required personally to be and appear before our surrogate of our county of, at his office in, in said county, on the day of next, at ten o'clock A. M., to attend the proof of the debt or claim of, an executor named in the last will and testament of the said deceased, against the said testator.

In testimony, &c.

Witness, &c.

(Signed,)

Surrogate.

[The "proper persons" referred to in the statute, upon whom this citation should be served, are the persons who might be prejudiced by the proof and allowance of the claim.]

No. 74.

PETITION OF A CREDITOR FOR AN ORDER THAT AN ADMINISTRATOR
PAY A DEBT.

[Ante, pp. 300, 301.]

To the surrogate of the county of

The petition of, of, respectfully sheweth:

That your petitioner is a creditor of, late of, deceased, to the amount of \$1000, which accrued to your petitioner for so much money lent and advanced by your petitioner to the intestate in his lifetime, for which he gave to your petitioner his promissory note; [set it out, and describe the general nature of the indebtedness; that no payments have been made, and no off-sets exist against said debt.] That on or about, one A. B.,

was appointed by the said surrogate administrator of all and singular the goods, chattels and credits of the said deceased, and on or about the day of made and returned an inventory of the personal estate of the said deceased, whereby it appears that assets to the amount of came to the hands of the said administrator, and which are amply sufficient to pay and satisfy all the debts of the said deceased. That the said administrator, in pursuance of the statute, issued and caused to be published a notice for claims against the said estate, whereupon your petitioner, within the time limited for that purpose, presented to the said administrator his aforesaid claim, with the vouchers thereof, and the correctness of the same was duly assented to by the said administrator; that your petitioner, after the expiration of one year from the granting of said letters, demanded payment of the said claim from the said administrator, and he has hitherto neglected and refused to pay the same or any part thereof.

You petitioner therefore prays that a decree may be made, pursuant to the statute in such case made and provided, against the said administrator, for the payment of the said claim of your petitioner.

And your petitioner will ever pray, &c.

Dated.

(Signed.)

Jurat, as in No. 6.

The order for citation, and citation to show cause against the order, can easily be framed.

No. 75.

PETITION FOR ORDER TO ACCOUNT.

[Under 2 R. S. 92, § 52, and L. of 1837, ch. 460, § 76, 3 R. S. 178, 5th ed. Ante, pp. 414, 415.]

To the surrogate of the county of

The petition of John Doe, of, in said county, respectfully sheweth:

That your petitioner is a legatee named in the last will and testament of, late of, deceased. That the said will was admitted to probate by the said surrogate, and recorded in his office in on, and that letters testamentary thereof were duly granted by said surrogate on to, sole executor named in said will, and more than eighteen months have expired since the time of such appointment. That the legacy to your petitioner is in the following terms: [Here set it out.]

That the said testator left a large personal estate, amounting to twenty thousand dollars, as by inventory thereof, filed in the office of the said surrogate, will fully appear; that the personal estate was amply sufficient to pay and satisfy all the debts, funeral charges and other expenses of administration, and all the legacies bequeathed in and by the said will.

Your petitioner has frequently since the expiration of the said eighteen months from the date of the letters testamentary, applied to the said executor for an account of his administration in this matter, and for payment of the said legacy; but the said executor has hitherto neglected and refused to render such account or to pay the said legacy.

Your petitioner therefore prays that the aforesaid executor may be required to pay to your petitioner the amount of the said legacy, and that an order may be granted requiring the said executor, at a certain day therein to be appointed, personally to appear in this court and render an account of his proceedings as such executor, and that such other and further proceedings may be had thereon as may be requisite to enforce the payment of your petitioner's legacy, and as shall be just and equitable.

And your petitioner will ever pray, &c.

Dated.

(Signed.)

Jurat, as in No. 6.

No. 76.

ORDER TO ACCOUNT.

[Ante, p. 415.]

IN THE MATTER OF THE ESTATE OF, LATE OF, DECEASED.	}	Date.
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On reading and filing the petition of John Doe, one of the legatees named in the last will and testament of, late of, deceased: it is ordered that, the executor of the said will, personally be and appear before the surrogate of the county of at his office in, on, &c. &c. and render an account of his proceedings as such executor, or show cause why an attachment should not issue against him.

(Signed,)

Surrogate.

[See as to the mode of serving this order, ante, p. 415. L. of 1837, ch. 460, § 76. 3 R. S. 178, 179. It seems that no citation is required in this case.]

No. 77.

EXECUTOR'S APPLICATION FOR FINAL SETTLEMENT OF HIS ACCOUNT.

[Under 2 R. S. 93, § 60, which can be easily modified for an application for a voluntary settlement, under 2 R. S. 95, § 70. Ante, p. 423.]

To the surrogate of the county of

The petition of, executor of the last will and testament of,

late of, deceased, respectfully sheweth: that letters testamentary were issued to him as such executor by the said surrogate, on the day of last; that the last will and testament of the said deceased was proved and recorded in the office of the said surrogate on the day of; that eighteen months and upwards have expired since the issuing to your petitioner of the said letters testamentary; *that your petitioner, at least six months after the granting of said letters, caused the notice to be inserted once a week for six months in such newspapers as were directed by the surrogate, and in the manner required by law, requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to your petitioner at his place of residence, at a day now past, and at a day at least six months from the day of the first publication thereof.**

Your petitioner further sheweth that the said testator disposed of his estate by his said will in the following manner, [here set out the substance of the will,] as by the said will recorded in the surrogate's office, reference being thereto had, will appear; and your petitioner begs leave to refer to the same, or the probate thereof, if it shall be necessary.

That your petitioner has been required by the surrogate, on the application of one of the legatees, [or creditors, as the case may be,] to render an account of his proceedings as such executor, and that he desires to have his account finally settled.

Your petitioner therefore prays that a citation may be issued requiring the creditors, legatees and next of kin of the said deceased to appear before the surrogate of the said county, on some day therein to be appointed, to attend the settlement of such accounts.

And your petitioner will ever pray, &c.

Dated.

(Signed.)

Jurat, as in No. 6.

If there has been no order to account, omit the parts in italics, and substitute therefor the following:

That your petitioner is prepared to render a final account of the proceedings as such executor. He therefore prays that a citation may issue, out of and under the seal of this court, to be directed to all persons interested in the estate of the said deceased, requiring them to appear on a certain day to be therein specified, to attend the final settlement of the accounts of your petitioner as such executor as aforesaid.

* The part in italics should be omitted if the executor has omitted to publish notice. That being for the benefit of the executor, his omission does not prevent his liability to be called on to account.

No. 78.

ORDER FOR CITATION TO ATTEND THE FINAL SETTLEMENT IN
THE FIRST CASE.

[Ante, p. 423.]

IN THE MATTER OF THE ACCOUNTING OF, EXECUTOR &c. OF, LATE OF, DECEASED.	}	Date.
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The above named, executor, having been required by the surrogate to render an account of his proceedings as such executor, and more than eighteen months having expired since the date of his letters testamentary, and being desirous to have his account finally settled; wherefore, on reading and filing his petition to that effect, dated this day, it is ordered that a citation issue requiring the creditors, legatees and next of kin of the said deceased to appear in court on the day of next, at ten o'clock A. M., then and there to attend the final settlement of the account aforesaid.

No. 79.

CITATION THEREON.

[Ante, p. 423.]

The People, &c., to the creditors, legatees and next of kin of, [L. S.] late of, deceased, send greeting.

You and each of you are hereby cited and required personally to be and appear before our surrogate of the county of, at his office in, in said county, on the day of, at ten o'clock A. M., then and there to attend the final settlement of the account of, as the executor of the last will and testament of the said deceased.

In testimony, &c.

Witness, &c.

No. 80.

ORDER FOR CITATION IN THE SECOND CASE.

[Ante, p. 427.]

The same as No. 78, except that the recital, instead of saying that he has *been required to render an account*, will simply say, "being prepared to render an account," &c. and instead of praying a citation "to the creditors, legatees and next of kin," will pray that a citation issue "to all persons interested in the estate of, late of, deceased;" and the citation will be like No. 79, except in its direction, which will be in conformity to the order.

No 81.

ACCOUNT RENDERED BY AN EXECUTOR OR ADMINISTRATOR ON A
FINAL SETTLEMENT.

[See Dayton's Surrogate, App. p. 49. Ante, pp. 427, 428.]

Saratoga Surrogate's Court.

IN THE MATTER OF THE ACCOUNTING OF, EXECUTOR, &C. OF, LATE OF DECEASED.	}	Account of proceedings.
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To the surrogate of the county of Saratoga.

I, John Doe, of, in said county, do respectfully render the following account of my proceedings as executor of the last will and testament of, late of, deceased, for final settlement and allowance.

Letters testamentary of the last will and testament of, late of, deceased, were issued to me by the said surrogate, bearing date the day of, I having first taken the oath of office as such executor. On the day of, I caused an inventory of the personal estate of the deceased to be filed in the office of the said surrogate, which personal estate was duly appraised by the appraisers appointed by the surrogate in the aggregate at \$10,000.

Schedule A, hereto annexed, contains a statement of all the property contained in said inventory, sold by me, with the prices and manner of sale; which sales were fairly made by me at the best prices that could then be had with due diligence. It also contains a statement of all the debts due the said estate, and mentioned in said inventory, which have been collected, and also of all interest for money received by me, for which I am legally accountable.

Schedule B, hereto annexed, contains a statement of all debts in said inventory mentioned, not collected or collectable by me, together with the reasons why the same have not been collected and are not collectable; and also a statement of the articles of personal property mentioned in said inventory unsold, and the reasons of the same being unsold, and their appraised value; and also a statement of all property mentioned therein, lost by accident, without any willful default or negligence, the cause of its loss and appraised value. No other assets than those in said inventory, as herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said schedules A and B.

Schedule C, hereto annexed, contains a statement of all moneys paid by me for funeral and other necessary expenses for said estate, together with the reasons and object of such expenditure.

On or about the day of, in the year 18...., I caused a notice for claimants to present their claims against the said estate to me within the period fixed by law, and at a place therein appointed, to be published in two newspapers, according to law, for six months, pursuant to an order of the surrogate of the county of; to which order, notice and due proof of publication, herewith filed, I refer as part of this account.

Schedule D, hereto annexed, contains a statement of all the claims of creditors presented to and allowed by me, or disputed by me, and for which a judgment or decree has been rendered against me, together with the names of the claimants, the general nature of the claim, the amount and the time of the rendition of the judgment; it also contains a statement of all moneys paid by me to the creditors of the deceased, and their names and the time of such payment.

Schedule E, hereto annexed, contains a statement of all moneys paid to the legatees, widow or next of kin of the deceased.

Schedule F, hereto annexed, contains the names of all persons entitled, as widow, legatee or next of kin of the deceased, to a share of his estate, with their places of residence, degree of relationship, and a statement as to which of them are minors, and whether they have any general guardian, and if so, their names and places of residence, to the best of my knowledge, information and belief.

Schedule G, hereto annexed, contains a statement of all other facts affecting my administration of said estate, my rights and those of others interested therein.

I charge myself:

Amount, as per inventory,	\$00 00
Increase as shown by schedule A,	00 00

I credit myself:

Amount of losses on sales, as per schedule D,	00 00
“ debts not collected, as per schedule D,	00 00
“ schedule C,	00 00
“ “ D,	00 00
“ “ E,	00 00

Leaving a balance of	<u>\$00 00</u>
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to be distributed to those entitled thereto, subject to the deductions of the amount of my commissions and the expenses of this accounting. The said several schedules, which are signed by me, are part of this account.

(Signed,)

JOHN DOE, *Executor.*

OATH OF EXECUTOR.

County of, ss. I, John Doe, executor of the last will and testament of, late of, deceased, being duly sworn, say that the

charges made in the foregoing account of proceedings, and schedules annexed, for moneys paid by me to creditors, legatees and next of kin, and for necessary expenses, are correct; that I have been charged therein all the interest for moneys received by me and embraced in said account, for which I am legally accountable; that the moneys stated in said account as collected were all that were collectable, according to the best of my knowledge, information and belief, on the debts stated in such account at the time of this settlement thereof; that the allowances in said account for the decrease in the value of any assets, and the charges therein for the increase in such value, are correctly made; and that I do not know of any error in said account, or any thing omitted therefrom, which may in any wise prejudice the rights of any party interested in said estate. And I further say that the sums under twenty dollars charged in the said account, for which no vouchers or other evidences of payment are produced, or for which I may not be able to produce vouchers or other evidences of payment, have actually been paid and disbursed by me as charged.

JOHN DOE.

Sworn, this day of, }
 18...., before me, }
, *Surrogate*.

No. 82.

ORDER REFERRING ACCOUNT TO AN AUDITOR.

[Ante, p. 432.]

Title. (As usual.)

Date.

John Doe, the executor of the last will and testament of, late of, deceased, having rendered his account of his proceedings, as such executor, to the surrogate, it is ordered that the said account and all the vouchers thereof and testimony taken by the surrogate, in relation thereto, be referred to Richard Roe, Esq., of, as auditor, to examine and report thereon.

And it is further ordered that the first hearing of this matter before the said auditor take place at, on, and that the said auditor bring in his report before the surrogate on the day of next, at 10 o'clock A. M., which time is appointed for the hearing of the parties hereto, at the surrogate's office, on the confirmation of the report of the said auditor.

[N. B. By the act of 1859, page 569, amending the 36th section 2 R. S. 88, the accounts may be referred to *one* disinterested person as auditor; and it is not necessary that it should be referred to *three*, as formerly.]

No. 82.(a)

AUDITOR'S REPORT.

[Ante, p. 433.]

Surrogate's Court—Saratoga County.

IN THE MATTER OF THE ACCOUNTING OF JOHN DOE, EXECUTOR OF THE LAST WILL AND TESTAMENT OF, LATE OF, DECEASED.	}
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To the surrogate of the county of Saratoga.

I, the undersigned, auditor duly appointed by the said surrogate to examine the accounts of John Doe, executor above named, and to make a report thereon subject to the confirmation of the surrogate, do respectfully report:

That I have been attended by the said executor, and by all the parties interested in the said accounting, and have examined the said accounts, the vouchers thereof, and the testimony in relation thereto, and have heard the arguments of the respective parties, and I do find that the statement of the said accounts by the said executor presented to the said surrogate and referred to me, is in all respects just and correct.

All which is respectfully submitted.

Dated.

(Signed,)

Auditor.

No. 83.

ORDER CONFIRMING REPORT.

[Ante, p. 433.]

Title. (As above.)

On reading and filing the report of, auditor, appointed by the surrogate in this matter, whereby he finds the account of the executor, rendered in this case, in all respects correct, and the parties having been heard before the surrogate, after the coming in of the said report, and the said report appearing to the said surrogate to be in all things correct, it is ordered that the same be and it is hereby confirmed, and the accounts of the said executor are hereby finally settled and allowed.

The following is a summary statement of the said accounts as settled and allowed, made and recorded, pursuant to the statute, viz:

[Here set out the same.]

NOTE.—If the auditor finds the account of the executor incorrect, he should, if it be necessary, restate the whole account in such a manner as justice may require. The order of confirmation will be the basis of the decree, and the report of the auditor the substance of the statement which the statute requires to be referred to in the decree. (Laws of 1837, ch. 460, § 2. 3 R. S. 365, 5th ed.)

No. 84.

PROCEEDINGS FOR THE SALE, LEASING OR MORTGAGING REAL ESTATE
FOR THE PAYMENT OF DEBTS.[Ante, p. 306 *et seq.*]

FORM OF PETITION BY AN EXECUTOR. [Ante, 309.]

To the surrogate of the county of

The petition of A. B., executor of the last will and testament of C. D., late of the town of, in the county of, and state of, deceased, respectfully sheweth:

That letters testamentary on the said will were issued to your petitioner by the surrogate of the said county of, on the day of, 1859, and your petitioner, shortly afterwards, caused an inventory of the personal estate of the said deceased to be duly made, according to law, and which was duly filed in the office of the said surrogate, on the day of, as appears by the certificate of the said surrogate, hereto annexed: That the amount of personal property which has come to the hands of your petitioner is, and the same has been applied by your petitioner in the payment of funeral charges, the necessary expenses of administering the said estate, and in payment of the debts of the said testator as far as the same would extend: That the valid and subsisting debts outstanding against the said estate, as near as can be ascertained, amount to the sum of: That the said debts are not secured by judgment, mortgage or other charge on the real estate of the said deceased or any part thereof: [or, that the said debts were secured by a charge in the testator's will on a certain lot known as lot No., in, [describe it,] which your petitioner was authorized to sell for that purpose; that your petitioner has, in pursuance of the said power, sold the said lot, for the sum of, being the full value thereof, and applied the said money, in satisfaction of said debts, as far as it would extend, and that there still remains due and outstanding against the said estate, the sum of, not secured by judgment, mortgage or other charge upon the real estate of the deceased, or any part thereof:]

That the said deceased died seised, as is alleged, of the following described pieces or parcels of land, to wit: a certain piece or parcel of land situate in S., in the county of, and bounded as follows, (describe it,) containing acres of land, and is of the value of, in the judgment of your petitioner, and is now in the occupation of G. H.; also another lot, situate &c., [as before.] That J. I., K. L., &c., of the town of, in the county of, are devisees named in the said will, and are of the age of twenty-one years and upwards, as your petitioner is informed and believes: That N. O., of the town of, in the said county, is also a devisee named in the said will—is a minor under the age of twenty-one years, as your petitioner is informed and believes: That I. T. and K. T., of, &c., are heirs of the said deceased, of the age of twenty-one years and upwards, and that

N. O., of, &c., is also an heir of the said deceased, and a minor under the age of twenty-one years: That the said deceased left a widow, whose name is, and who resides in

Your petitioner therefore prays that some disinterested freeholder may be appointed guardian for the above named minors, for the sole purpose of appearing for them and taking care of their interest in the proceeding; and that authority may be granted to your petitioner, pursuant to the statute in such case made and provided, to mortgage, lease or sell so much of the real estate, whereof the said deceased died seised, as shall be necessary to pay his debts still remaining due and unpaid, together with the costs of this proceeding. *And your petitioner states that, in his judgment, a sale of said premises would be more advantageous to said estate than a lease or mortgage.*

And your petitioner will ever pray, &c.

Jurat as in No. 6.

[If the intention be to apply for authority to lease or mortgage the estate, the petition should be varied accordingly.]

No. 85.

NOTICE TO MINOR HEIR OR DEVISEE IN THE COUNTY.

[Ante, p. 310.]

' To, minor devisee [or heir, as the case may be,] of A. B., late of the town of, in the county of, deceased :

Take notice, that an application will be made to the surrogate of the county of, at his office in, in said county, on the day of, at ten o'clock A. M., for the appointment of a guardian for the above named minors, respectively, for the sole purpose of appearing for them and taking care of their interest in an intended application to the said surrogate for authority to lease, mortgage or sell the real estate of the said deceased to pay his debts.

Yours, &c.

Dated.

M. N., *Executor.*

No. 86.

ORDER FOR THE APPOINTMENT OF GUARDIAN FOR MINOR, ENTERED
IN BOOK FOR SALES OF REAL ESTATE.

[Ante, p. 310.]

IN THE MATTER OF THE REAL ESTATE OF, LATE OF, DECEASED.	}	May 1, 1859.
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On reading and filing the affidavit of A. B., setting forth that he did, on the day of April last, personally serve and and,

minors and devisees named in the last will and testament of the said deceased, [or heirs at law of the said deceased,] with a notice, in writing, that an application would this day be made to the surrogate of said county, at, for the appointment of a guardian ad litem for the said minors,, respectively, for the sole purpose of appearing for and taking care of their interest in the proceedings intended to be instituted before the said surrogate, for authority to lease, mortgage or sell the real estate of the said deceased, and the said surrogate having heard the allegations of the parties and duly considered the same, it is ordered that, of, be appointed guardian of the said minors, respectively, for the purpose aforesaid.

No. 87.

ORDER TO SHOW CAUSE.

[Ante, p. 312.]

IN THE MATTER OF THE REAL ESTATE OF, LATE OF, DECEASED.	}	Date.
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On reading and filing the petition of A. B., executor of the last will and testament of the said deceased, praying that authority may be granted him to mortgage, lease or sell the real estate of the deceased, for the payment of his debts, it is ordered that all persons interested in the said estate appear before the surrogate of the county of, at, on the day of, at 10 o'clock A. M., to show cause why authority should not be given to the said executor to mortgage, lease or sell so much of the real estate of the said deceased as will be necessary to pay his debts; and it is further ordered that all persons, having demands against the said estate, exhibit and prove the same at the time and place aforesaid; and it is further ordered that a copy of this order be published weeks, successively, in, and be otherwise served, as the law directs.

No. 88.

ORDER FOR LEAVE TO PRESENT CLAIMS, AND FOR EXECUTORS TO
 RENDER ACCOUNT, &c.

[Ante, p. 312.]

IN THE MATTER OF THE REAL ESTATE OF, LATE OF, DECEASED.	}	Date.
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On reading and filing an affidavit of the due publication in for weeks successively, of a copy of the order heretofore granted in this

matter, bearing date the, and also an affidavit of the due service of a copy of said order on the widow, &c. [stating the persons on whom service is required to be made by name,] in the manner required by law; it is ordered that leave be given to all persons interested in the estate of the deceased to show cause, if any they have, why authority should not be given to the executors of the last will and testament of the deceased to *sell* the real estate of the deceased for the payment of his debts; that the said executor render an account of the administration of the personal estate of the said deceased; and that all persons having claims against said estate have leave to exhibit and prove them as the law directs.

No. 89.

ORDER SETTLING ACCOUNTS AND ALLOWING CLAIMS.

[Ante, pp. 312-319.]

IN THE MATTER OF THE REAL ESTATE OF, DECEASED.	}	Date.
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This cause having been brought to a hearing on the day of, and stood over for consideration until this day, and this court having fully examined the accounts and vouchers of, executor, &c. &c. and duly considered the same, it is ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the estate of the said deceased be credited in account with the said executor with the sum of \$900.00, being the amount of the inventory of the goods, chattels and credits of the said deceased returned to this office by the said executor, and with the sum of \$100.00, being for gains on the said inventory arising from the interest of money and property discovered since the said inventory was returned as aforesaid, as per schedule A on file; and be charged with the following sums, duly proved and substantiated, to wit: with the sum of \$20.00 for the surrogate's fees on admitting the last will and testament of the deceased to probate, and receiving the return of inventory; with the sum of \$80.00 for sundry expenses attending the administration of said estate, as per schedule B; with the sum of \$100.00 for loss on the said inventory, as per schedule C; and with the sum of \$800.00 for so much money paid to divers creditors of the estate of the deceased on account of their said debts, as per schedule D. And it is further ordered that an account current of the said accounting be entered in this book at large.

And whereas, on the day of, sundry claims against the said estate were exhibited to this court, and this court having heard the proofs and allegations in relation thereto, and duly considered the same, it is therefore further ordered, adjudged and decreed, and this court, by virtue of the

power vested in it, doth order, adjudge and decree, that there is due and owing from the said estate to the several persons hereinafter named in the schedule hereto subjoined, the sum of money set opposite to their names respectively, over and above all discounts, and that the said respective sums are valid and subsisting debts against the said estate, not secured by judgment, mortgage, or other lien against the real estate of the said deceased. [If any debt was originally secured by a lien on any of the land, &c. state the fact, and that the remedy of the creditors against said land had been exhausted.] And whereas

one John Doe exhibited to this court, on the day and year
Claim rejected. aforesaid, a certain claim against the said estate, for the amount of a certain promissory note, alleged to have been made by the deceased in his lifetime, bearing date the 1st June, 1840, for the payment to the said John Doe of \$100 one day after the date thereof, with interest; and whereas one, an heir of the said deceased, did allege before this court that the said pretended claim of the said John Doe did not accrue at any time against the said deceased within six years next before the death of the said deceased, and did thereupon insist that the statute of limitations might be deemed a bar to the said claim; and whereas, after hearing the proofs and allegations of the said parties, this court is satisfied that the said supposed demand of the said John Doe did not accrue at any time within six years next before the death of the said deceased: it is therefore ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the said pretended claim of the said John Doe is not a valid and subsisting claim against the estate of the said deceased, and that the same be rejected.

Schedule of the claims against the estate of, deceased, adjudged to be valid and subsisting, and referred to in the foregoing order.

Richard Roe,	\$500 00
John Stiles,	675 45
James Jackson,	983 21
	<hr/>
	\$2158 66

The Estate of in account with A. B., executor of, entered in pursuance of the foregoing order.

DR.			CR.		
1859	To cash paid surrogate,	20 00	1859	By amount of inventory of the estate of the deceased,	
	“ expenses of administration, schedule B,	80 00		“ gain on inventory as perschedule A.	900 00
	“ loss on inventory, schedule C, - -	100 00			100 00
	“ cash paid to creditors of estate on account of debts, schedule D, - - -	800 00			
		<hr/>			<hr/>
		\$1000 00			\$1000 00

No. 90.

ORDER OF SALE.

[Ante, pp. 320, 327.]

IN THE MATTER OF THE REAL ESTATE OF, LATE OF, DE- CEASED.	} Date.
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Whereas, executor of the last will and testament of, the above named, deceased, lately presented his petition to the surrogate of the county of Washington, for authority to mortgage, lease or sell so much of the real estate of the said deceased, as would be necessary to pay the debts of the said deceased, and such proceedings have been had thereon, pursuant to the statutes in such case made and provided, that the said surrogate is satisfied, upon due examination in the premises, that the said executor has fully complied with the several provisions of the said statutes, and that the debts outstanding against the deceased, as far as the same can be ascertained, and which are valid and subsisting, and are not secured by judgment, mortgage, or other lien, on the real estate of the said deceased, amount to the sum of \$2158.66; and that the personal estate of the said deceased is insufficient to pay his debts; and that the whole of the said personal estate, which could have been applied to the payment of the debts of the said deceased, has been duly applied for that purpose; and whereas it has been made to appear to the said surrogate, that the moneys required to be raised by the said executor, cannot be raised by mortgage, or lease, advantageously to the said estate, and the said executor has, in conjunction with two sureties, executed a bond to the people of this state, in the manner required by law, which is duly acknowledged, approved and filed;† it is therefore ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the said executor sell at public auction or vendue, the following described real estate of the said deceased, to wit: [here describe the several parcels to be sold.] *And it is further ordered, that on the said sale the said*

On a cash sale this should be omitted, and it should, on a credit sale, be conformable to the order of the court.

Inserted only when necessary.

executor be authorized to give such length of credit, not exceeding three years, for not more than three-fourths of the purchase money, as shall seem best calculated to produce the highest price, and shall secure the moneys for which credit may be given, by a bond of the purchaser, and by a mortgage of the premises sold. And it is further ordered, that the several tracts of land hereinbefore described, be sold in the following order, to wit: [here describe the order, stating which

tract shall be sold first, according to § 20, 2 R. S. 103.]

And it is further ordered, that before any deed or deeds of the premises sold are executed, the said executor make a return of the proceedings had on

this order, to the said surrogate, to the end that the said surrogate may examine the said proceedings, and the fairness and legality of the said sale.

SPECIAL ORDER, &c. [pp. 320, 327.]

Same as last to †, and then as follows:

And whereas it manifestly appears that the said real estate of the said deceased is so situated that a part thereof cannot be sold without great prejudice to the heirs [or devisees, as the case may be] of the said deceased, it is therefore ordered, &c., as in last precedent.

No. 91.

REPORT OF SALE.

[Ante, p. 327.]

Oneida Surrogate's Court.

IN THE MATTER OF THE REAL ESTATE OF, LATE OF, DE- CEASED.	}
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In pursuance of a decretal order of the surrogate of the county of aforesaid, bearing date the day of, I, the subscriber, executor of the last will and testament of the above named deceased, did, on the day of, at the house of, in said county, between the hours of 9 o'clock in the forenoon, and the setting of the sun on that day, sell at public vendue, the whole of the premises in the said order described, to John Styles, for the sum of, which was the highest sum bid for the same. And I do further return, that before the said sale, I caused notice of the time and place thereof to be regularly published, once a week for six weeks, successively in the, a newspaper printed in said county, and a like notice to be posted for six weeks at three of the most public places in the the said town of; and further, that the said sale was legally made and fairly conducted, and that a greater sum could not be obtained, on said sale, for the premises aforesaid, than above stated. Dated.

A. B.

County of, ss. A. B., executor, &c., above named, being duly sworn, saith that the facts set forth in the foregoing return are true, according to the best of his knowledge and belief.

Sworn, &c.

A. B.

No. 92.

ORDER CONFIRMING SALE.

[Page 327.]

IN THE MATTER OF THE REAL ESTATE OF	}	Dated.
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On reading and filing the return of, executor of the last will and testament of the above deceased, and sundry affidavits accompanying the same, by which it appears that the said executor did, on the day of, in obedience to the order of this court, in the above matter, bearing date the day of last, and in pursuance of the statute in such case made and provided, sell, at public auction, to one John Styles, for the sum of \$1000, the lands and tenements in the said order mentioned, upon the terms particularly mentioned in said report; and it appearing to the surrogate that the said sale was legally made and fairly conducted, and that a greater sum cannot be obtained for said premises than was bid on said sale, it is therefore ordered that the said sale be and the same is hereby confirmed: And it is further ordered that a conveyance of the said premises be made and executed in due form of law, by the said executor, to the said John Styles, his heirs and assigns forever, upon his complying with the terms of sale on his part to be performed: And it is further ordered that the said executor bring into this office the moneys raised on said sale.

NOTE.—The foregoing report and order can be easily varied for a credit sale.

No. 93.

BOND ON SALE OF REAL ESTATE.

[Page 320.]

Know all men by these presents, that we [the executor or administrator and two sureties,] are held and firmly bound unto the people of the state of New York, in the sum of [double the value of the real estate to be sold,] lawful money of the United States, to be paid to the said people; to the which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this day of, 185...

Whereas an application for authority to sell the real estate of, deceased, to pay his debts, is now pending before the surrogate of the county of, on the petition of the above bounden, executor of the last will and testament of the said deceased, now therefore, the condition of this obligation is such, that if the said, in case the said surrogate shall grant an order of sale of said real estate, or any part thereof, shall pay all the

moneys arising from such sale, after deducting the expenses thereof, and shall deliver all securities taken by him on such sale to the said surrogate, within twenty days after the same shall have been received and taken by him, then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in presence of

FORM OF EXEMPLIFICATION OF ORDER OF SALE, OR ANY OTHER PROCEEDING.

The People of the state of New York, by the grace of God, free and independent:

[L. s.] To all to whom these presents shall or may come, greeting.

Know ye, that we having caused the records of our surrogate's court of our county of Washington to be inspected, do find there of record, in the book A, kept in the said court for sales of real estate, a certain decretal order in the words and figures following, to wit: [Here set out the order of sale, or as the case may be, *verbatim* to the end of it, and then add:]

All which we have caused, by these presents, to be exemplified, and the seal of our said surrogate's court to be hereto affixed.

Witness J. W., surrogate of the said county of W., at S, this day of, in the year of our Lord, one thousand eight hundred and fifty-nine.

J. W., *Surrogate*.

NOTE.—The order of sale and order confirming it must be set out at length in the deed. The formal words by which it is exemplified under seal, or the seal, need not be so inserted. They are necessary only to authenticate the order as evidence, and not to give it validity as an order. No order is made under seal. Another form of caption for the order is the same as in No. 8, with a conclusion—In testimony, &c., as in No. 8, with the seal of office of the surrogate thereto affixed. Either way is believed to be valid.

No. 94.

DEED FROM EXECUTOR TO PURCHASER.

[Ante, p. 329.]

This indenture made the day of, in the year of our Lord one thousand eight hundred and, between, executor of the last will and testament of, late of, deceased, of the first part, and John Styles, of the same place, of the second part: Whereas, at a surrogate's court, held for the county of, at the surrogate's office in, in said county, on the day of, one thousand eight hundred and, before, surrogate of the said county, a certain decretal order was made for the sale of the real estate of the said deceased, and which said order is in the words and figures following, to wit: [Here copy the order of sale at length.] And whereas, in obedience to said

order, and in pursuance of the statute in such case made and provided, the said party of the first part did, on the day of, sell at public auction, the whole of the premises, in the said order mentioned, to the said party of the second part, for the sum of, and did thereupon duly make return of his proceedings in the premises to the surrogate of the said county; whereupon, afterwards, to wit, at a surrogate's court held for said county, at the surrogate's office in S, in said county, before, surrogate of the said county, on the day of, in the year one thousand eight hundred and fifty-nine, another order of the said surrogate's court was made in the words and figures following, to wit: [Here set out the order confirming the sale at length.]

And whereas the said party of the second part has, in all things, complied with the terms of the said sale, on his part to be performed: Now therefore, this indenture witnesseth, that the said party of the first part for and in consideration of the sum of, to him in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said party of the second part, his heirs and assigns forever, the lands and tenements, in the said order mentioned, [if part only, set out such as are sold,] together with all and singular the hereditaments and appurtenances thereunto belonging, or in any way appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, claim and demand which the said deceased had at the time of his death, of, in and to the said premises: To have and to hold the same to the said party of the second part, his heirs and assigns forever, to the sole and only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year in this indenture first above written.

Scaled and delivered in } [L. s.]
presence of }

NOTE.—This deed should be proved, or acknowledged, and recorded the same as other deeds.

No. 95.

ORDER FOR DISTRIBUTION, &c.

[Ante, p. 334.]

IN THE MATTER OF THE REAL ESTATE OF LATE OF, DECEASED.	}	Date.
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The avails of the real estate of the deceased, sold under the order heretofore made in this matter, having been brought into court, it is ordered that all per-

sons having any claims or demands against the estate of the deceased, which have not already been allowed, exhibit and prove the same before the surrogate of the county of, at his office, in, in said county, on the day of next, at ten o'clock in the forenoon: And it is further ordered that distribution be made among the creditors of the deceased, on the day and at the place aforesaid, or as soon thereafter as the said claims and demands can be examined, and that a copy of this order be published six weeks, successively, in the

No. 96.

ORDER FOR LEAVE TO EXHIBIT CLAIMS.

[Ante, p. 334.]

IN THE MATTER &c. OF	}	Date.
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On filing an affidavit of due publication of a copy of the order made in this matter on the day of last, it is ordered that all persons having claims against the estate of the deceased which have not already been examined, have leave to exhibit and prove the same.

No. 97.

ORDER ALLOWING CLAIMS AND DECREERING DISTRIBUTION.

[Ante, p. 335.]

IN THE MATTER, &c. &c.	}	Date.
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This cause having been brought to a final hearing on the day of, and divers persons having claims against the estate of the deceased having presented the same for allowance; whereupon, after hearing the proofs and allegations of the parties, it is ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree that there is due and owing from the estate of the said deceased to the several persons hereinafter in the schedule marked A subjoined to this order mentioned, the sums of money set opposite their names respectively, over and above all discounts, and that the same are valid and subsisting debts against the said estate, not secured by judgment, mortgage or other lien against the real estate of the said deceased;† and it is further ordered, that there be allowed and paid out of the avails of the said real estate, sold in pursuance of the order

heretofore made in this matter, to the several persons hereinafter mentioned, for their costs and charges in this matter, the following sums, to wit:

To A. B., executor, as per bill on file,	\$15 00
“ “ for printer's bill paid by him,	12 00
“ the surrogate, for his fees in this matter,	25 00•
“ “ for his commissions,	50 00
“ G. H., attorney of executor taxed bill on file,	25 00
	<u>\$127 00</u>

And whereas it appears that the moneys arising from the sale of the said real estate amounts to the sum of, and the debts of the said deceased, as adjudged to be valid and subsisting by the order of this court, bearing date, and by this order, in the aggregate amount to, it is therefore further ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudged and decree, that so much of the said as is necessary to pay the said costs and charges as aforesaid be applied for that purpose, and that the residue be distributed among the said creditors of the said deceased *in proportion* to their respective debts, according to the schedule hereto annexed marked B, and that the same be paid on demand at this office.*

Schedule A of the claims against the estate of, deceased, adjudged by the foregoing order to be valid and subsisting.

L. M.,	\$25 00
O. P.,	30 00
	<u>\$55 00</u>

Schedule B of all the claims against the estate of, deceased, adjudged to be valid and subsisting, the whole sum due on each claim respectively, and the dividend to which each claimant is entitled out of the avails of the real estate of the deceased, in pursuance of the foregoing order.

NAMES.	Whole sum due.		Dividend.	
Richard Roe,	500	00	230	00
John Stiles,	675	45	259	69
James Jackson,	983	21	425	30
L. M.,	25	00	11	00
O. P.,	30	00	13	00
	<u>2213</u>	<u>66</u>	<u>938</u>	<u>99</u>

No. 98.

*If the avails of the real estate exceeds the expenses and debts, strike out the words at the conclusion of the foregoing order in italics, and insert instead thereof, “in payment of,” and at the end of the order * add as follows :*

And whereas, it appears that A. B. and C. D. were devisees, as tenants in

common, under the last will and testament of the said deceased, of lot No. 2, mentioned in the order of sale made in this matter on the day of, and that the said lot sold for the sum of \$500, parcel of the said, for which the whole of the said real estate of the said deceased was sold as aforesaid; and whereas it appears that after paying all the expenses of the said sale, and the valid and subsisting debts against the said estate as aforesaid, there remains the sum of \$200, it is therefore ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree that the sum of \$100, parcel of the said \$200 be paid in equal parts to the said A. B. and C. D., devisees, as aforesaid. And inasmuch as the residue of the said lands and tenements, sold as aforesaid was not devised by the said will, but descended to the heir at law of the said deceased, it is therefore further ordered that the remaining sum of \$100 be paid in equal parts to G. H. and J. K., heirs at law of the said deceased, pursuant to the statute in such case made and provided.

No. 99.

If the deceased left a widow entitled to dower in the lands sold, and she elects a gross sum in lieu of dower, add at the † in order, No. 90, as follows: [Ante, p. 334.]

And it appearing that A. B., widow of the said deceased, is entitled to dower in the lands and tenements sold as aforesaid, and the said A. B., having by an instrument in writing, under her hand and seal, bearing date, and duly acknowledged in the same manner as deeds entitled to be recorded, consented to accept, in lieu of her dower in the said lands, such sum in gross as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for such claims, which said written consent is on file in this court; and it appearing that the said A. B. is aged 45 years, and that the whole avails of said sale amount to, it is therefore ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the said A. B. is entitled to the sum of, in gross, as a reasonable satisfaction for said dower, according to the statute in such case made and provided, and that the same be paid to her at this office on demand.

NOTE. The residue of the order will require a slight modification where there is a widow's claim for dower.

No. 100.

If the widow does not consent to take a gross sum, the foregoing should be modified as follows: [Ante, p. 335.]

And it appearing that A. B., widow of the said deceased, is entitled to dower

in the lands and tenements sold as aforesaid, it is therefore further ordered that the sum of, being one third of the purchase money as aforesaid, be invested in permanent securities on annual interest, in the name of office of the said surrogate, and that the said interest be paid to the said A. B. annually during her life.

No. 101.

NOTICE TO THE WIDOW TO ELECT.

[Ante, p. 334.]

IN THE MATTER OF THE REAL }
ESTATE OF, &c. }

To A. B., widow of the above deceased. You are hereby notified and required to elect whether you will accept such sum, in gross, as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction of your claim for dower in the lands of the above deceased, in lieu of your said dower; and you are notified so to elect before the surrogate of the county of Washington, at his office in on the day of [the day appointed for distribution.] Dated, &c.

Signed by the Executor, &c.

No. 102.

FORM OF WIDOW'S CONSENT TO ACCEPT A GROSS SUM IN LIEU OF
HER DOWER.

[2 R. S. 106, § 36. 2 Comst. 245. Ante, p. 333.]

IN THE MATTER OF THE REAL ESTATE }
OF, LATE OF, DE- }
CEASED. }

Whereas certain lands and tenements of the said deceased, in which the undersigned is entitled to dower as the widow of the said deceased, have been recently sold by virtue of an order of the surrogate of the county of Washington, in this matter, and which said lands and tenements are bounded as follows, to wit:; and whereas the moneys arising from the said sale have been brought into the said surrogate's court for distribution, now therefore, know all men by these presents, that I, A. B., the widow of the said deceased, do by these presents consent to accept in lieu of my said dower in the lands and tenements aforesaid, such sum in gross, as shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for my said dower. In witness whereof I have hereto set my hand and seal, this day of, A. D. 185 .

Sealed and delivered in }
presence of }

A. B. (L. s.)

[To be acknowledged or proved in the same manner as deeds entitled to be recorded. The acknowledgment, of course, must be taken before a judge or commissioner; and if the dower has been previously assigned to the widow, it cannot be sold, but the purchaser takes the land subject to her dower. 2 Const. 245.]

No. 103.

ANNUITY TABLE.

[Ante, p. 334.]

A table corresponding with the Northampton tables referred to in the rules of the supreme court, showing the value of an annuity of one dollar, at six per cent, on a single life, at any age from one year to ninety-four, inclusive.

Age.	No. of years purchase the an- nuity is worth.	Age.	No. of years purchase the an- nuity is worth.	Age.	No. of years purchase the an- nuity is worth.	Age.	No. of years purchase the an- nuity is worth.
1	10.107	25	12.063	49	9.563	73	4.781
2	11.724	26	11.992	50	9.417	74	4.565
3	12.348	27	11.917	51	9.273	75	4.354
4	12.769	28	11.841	52	9.129	76	4.154
5	12.962	29	11.763	53	8.980	77	3.952
6	13.156	30	11.682	54	8.827	78	3.742
7	13.275	31	11.598	55	8.670	79	3.514
8	13.337	32	11.512	56	8.509	80	3.281
9	13.335	33	11.423	57	8.343	81	3.156
10	13.285	34	11.331	58	8.173	82	2.926
11	13.212	35	11.236	59	7.999	83	2.713
12	13.130	36	11.137	60	7.820	84	2.551
13	13.044	37	11.035	61	7.637	85	2.402
14	12.953	38	10.929	62	7.449	86	2.266
15	12.857	39	10.819	63	7.253	87	2.138
16	12.755	40	10.705	64	7.052	88	2.031
17	12.655	41	10.589	65	6.841	89	1.882
18	12.562	42	10.473	66	6.625	90	1.689
19	12.477	43	10.356	67	6.405	91	1.422
20	12.398	44	10.235	68	6.179	92	1.136
21	12.329	45	10.110	69	5.949	93	806
22	12.265	46	9.980	70	5.716	94	518
23	12.200	47	9.846	71	5.479		
24	12.132	48	9.707	72	5.241		

RULE FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at 6 per cent for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years purchase set opposite the person's age in the table, and the product is the gross value of the life estate of such person in said sum.

EXAMPLE.

Suppose a widow's age is 37; and she is entitled to dower in real estate worth \$350.75. One-third of this is \$116.91 $\frac{2}{3}$. Interest on \$116.91, one year

at 6 per cent (as fixed by the 76th rule) is \$7.01. The number of years purchase which an annuity of one dollar is worth, at the age of 37, as appears by the table, is 11 years and $\frac{35}{1000}$ parts of a year, which multiplied by \$7.01, the income for one year, gives \$77.35, and a fraction, as the gross value of her right of dower.

For the rule to compute the present value of an inchoate or contingent right of dower, see *Jackson v. Edwards*, 7 *Paige*, 480; *McKean's Pr. L. Tables*, 25, § 4; *Hendry's Ann. Tables*, 87, *Prob.* 4.

No. 104.

PETITION TO SELL ADDITIONAL PARCEL OF THE REAL ESTATE OF THE
DECEASED, WHEN THE AVAILS OF THE FIRST SALE
PROVE INSUFFICIENT.

[Ante, p. 330.]

To the surrogate of the county of

The petition of A. B., executor of the last will and testament of C. D., late of the town of, deceased, respectfully sheweth :

That your petitioner lately presented his petition to the surrogate of the said county, in due form of law, for authority to mortgage, lease or sell, so much of the real estate of the said deceased as would be necessary to pay his debts; and such proceedings were thereupon had, by the said surrogate, that afterwards, to wit, at a surrogate's court held, &c., the said surrogate being satisfied, upon due examination in the premises, that the said executor had fully complied with the several provisions of the statute in such case made and provided, and that the debts outstanding against the said deceased, as far as the same could be ascertained, and which were valid and subsisting, and not secured by judgment, mortgage or other lien on the real estate of the said deceased, amounted to, and that the personal estate of the said deceased was insufficient to pay his debts, and that the whole of the said personal estate which could have been applied to the payment of the debts of the said deceased had been applied for that purpose; it was thereupon ordered, adjudged and decreed, by the said court, that the said executor sell at public auction or vendue, the premises therein mentioned and described, and that he make return of his proceedings to the said court, according to law.

And your petitioner further sheweth, that the said executor, in pursuance of the said order, and by virtue of the statute in such case made and provided, on the day of, sold at public auction or vendue, the lands and tenements in the said order mentioned, to for the sum of, being the highest sum bid for the same, and did thereupon, on the day of, make a return of his said proceedings to the said surrogate; and the said surrogate did, by an order bearing date, confirm the said sale, and direct that a deed of the said premises be executed to the purchaser thereof, in pursuance of the terms of said sale.

And your petitioner further sheweth, that a deed was accordingly executed by your petitioner, according to the in part last mentioned recited order, and the money arising from the said sale was duly brought into court for distribution. And your petitioner further sheweth, that after the payment of the costs and charges in the said matter, the residue of the said money was distributed, by the said surrogate, among the creditors of the said deceased, whose debts were adjudged by the said court to be valid and subsisting, as far forth as the same would extend, leaving a balance of. still due and owing to the several persons whose debts were allowed as aforesaid, according to the schedule annexed to the order in this matter, dated.

And your petitioner further sheweth, that the said deceased died seised, as is alleged, of the following described premises, not sold under the former order in this matter, and which said premises are situate in.

[Set out description, value, name of occupant, devisee or heir, as in original petition, and conclude with the following prayer:]

Your petitioner therefore prays that authority may be granted to him, pursuant to the statute in such case made and provided, to mortgage, lease or sell so much of the said real estate as will be necessary to pay the debts of the said deceased, established as aforesaid, and which still remain due and unpaid, together with the costs of this proceeding, and your petitioner will ever pray, &c.

A. B.

Affidavit of the truth thereof, as in the first petition.

Bond of the executor is the same as in the first order, with a penalty double the value of the land. If the persons in possession were notified, under the first application, notice of this application need not, it is conceived, be given. But if they were not then notified, and the premises were not embraced in the first petition, it is believed that a notice to show cause should be served as on an original application; except that the creditors need not be called on to exhibit their claims, &c.

No. 105.

FOR THE SALE OF ADDITIONAL PARCEL OF LAND.

[Ante, p. 330.]

IN THE MATTER OF THE REAL ESTATE OF	}	Date.
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Whereas, heretofore, on the petition of A. B., executor of the last will and testament of, deceased, praying for an order granting authority to mortgage, lease or sell so much of the real estate of the said deceased as would be sufficient to pay his debts, pursuant to the statute in such case made and provided, such proceedings were thereupon had that the said surrogate's court did, on the day of, order, adjudge, and decree that certain

lands and tenements of the said deceased, therein mentioned, be sold for the payment of the debts of the said deceased; and whereas the said executor has, by his petition, duly verified by affidavit, set forth, that in pursuance of the said order, he caused the said premises to be duly sold to, for the sum of; that the said sale was duly confirmed by this court, by an order bearing date, and that the avails of the said sale have been duly distributed, by the said surrogate, among the creditors of the said deceased, whose claims have been heretofore allowed in proportion to their respective demands; and there still remains due and unpaid to the said respective creditors a large sum of money, amounting in the aggregate to the sum of, which he has no assets in his hands to pay, and that there is real estate of which the said deceased died seised, remaining in this state unsold, and praying that so much thereof may be ordered to be mortgaged, leased or sold as will be necessary to pay the said debts; and whereas it appears by the affidavit of, and by inspecting the record of the said surrogate's office, that the facts above set forth are true, it is therefore ordered, adjudged and decreed, [as in a common order of sale.]

No. 106.

ORDER THAT EXECUTOR &c. GIVE BAIL, PREPARATORY TO MAKING
ORDER OF SALE.

[Ante, p. 330.]

IN THE MATTER OF THE REAL ESTATE OF, LATE OF, DECEASED.	}	Date.
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It appearing by the records and files of this court, that the real estate of the deceased is of the value of, and that it is necessary to have the same sold for the payment of the debts of the deceased, it is therefore ordered that, executor of the last will and testament of the said deceased, in conjunction with two sufficient sureties, to be approved of by the surrogate, execute a bond to the people of this state, in the penal sum of [double the value of the real estate,] conditioned that the said will pay all the moneys arising from the sale of the real estate of the deceased, and deliver all securities taken by him on such sale, to the said surrogate, within twenty days after the same shall have been received and taken.

No. 107.

ORDER APPOINTING A DISINTERESTED FREEHOLDER TO CONDUCT
A SALE, &c.

[Ante, p. 320.]

IN THE MATTER OF THE REAL ESTATE OF, DECEASED.	}	Date.
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On filing the petition of, a creditor of the deceased, setting forth that, executor, has refused and still refuses to execute to the people of this state the bond required by the order of this court, bearing date the day of, and nominating a disinterested freeholder, to make the sale of the real estate of the said deceased, and on filing an affidavit of the truth of the facts in the said petition set forth, it is ordered that the said be appointed to make the sale of the real estate of the said deceased.

No. 108.

THE APPOINTMENT.

[Ante, p. 320.]

The People of the state of New York, by the grace of God, free and independent: [L. s.]

Whereas,, executor of the last will and testament of, late of, deceased, lately presented a petition to our surrogate of our county of W, for authority to mortgage, lease or sell so much of the real estate of the said deceased as would be necessary to pay his debts; and such proceedings have been thereupon had, in our said surrogate's court, that the said executor has been required, in conjunction with two sureties to be approved of by the surrogate, to execute a bond to the people of this state in the penal sum of, conditioned that the said executor will pay all moneys arising from the sale of the real estate of the deceased, after deducting the expenses thereof, and deliver all securities taken by him on such sale to the surrogate, within twenty days after the same shall have been received and taken by him; and the said executor has neglected and refused to execute such bond; and, a creditor of the said deceased, has applied to the said surrogate, for relief in the premises: Now therefore, be it known, that in pursuance of the statute in such case made and provided, and of an order of the said surrogate's court, duly made and entered, we have constituted and appointed, and by these presents do constitute and appoint, a disinterested freeholder, to make the sale of the real estate of the said deceased in the place of the said executor, hereby vesting in the said, upon his executing

such bond as is required by law, all the power and authority of an executor of the last will and testament of the said deceased, in relation to the sale of the real estate of the said deceased.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereto affixed.

Witness, surrogate of our said county, at, this day of, in the year of our Lord

A. B.

FORMS IN RELATION TO GUARDIANSHIP.

[Ante, p. 443.]

No. 109.

PETITION FOR THE APPOINTMENT OF A GUARDIAN BY A MINOR OF THE AGE OF 14 AND UNDER 21.

[Ante, p. 454.]

To the surrogate of the county of Washington.

The petition of A. B. respectfully sheweth:

That your petitioner is a minor under the age of twenty-one years and above the age of fourteen years, to wit: of the age of fifteen years and six months, as he verily believes; that your petitioner is a resident of the town of Salem, in the county aforesaid, and is the son of C. D., late of the same place, deceased; that the said C. D. departed this life on or about the day of, without having appointed, either by deed or will, any guardian for your petitioner, to his knowledge or belief. That your petitioner is seised of real estate of the annual value of sixty dollars, and is possessed of personal estate of the value of \$2000, as he is informed and believes; that your petitioner is desirous that a guardian be appointed of his person and estate during his minority, and for that purpose nominates E. F., of the town of, in the county of, to be such guardian.

Your petitioner states that the said E. F. is a suitable person to be appointed such guardian; that he has consented to act in that capacity, if appointed, and to give the requisite security.

Your petitioner therefore prays that the said surrogate will inquire into the circumstances above set forth, and grant the prayer of the said petition.

Dated.

A. B.

Washington county, ss. G. H., being duly sworn, saith that he is acquainted with the above named A. B., and was present and saw him subscribe his name to the foregoing petition.

Sworn, &c.

G. H.

No. 110.

CONSENT OF GUARDIAN.

[Ante, p. 455.]

I hereby consent to become guardian of the person and estate of A. B., the minor in the foregoing petition named, in case I should be appointed for that purpose. Dated,

In presence of

E. F.

L. M.

Washington county, ss. L. M., being duly sworn, saith that he is acquainted with E. F., in the foregoing petition named, and was present and saw him subscribe his name to the above consent.

Sworn, &c.

L. M.

No. 111.

AFFIDAVIT OF MINOR'S PROPERTY.

[Ante, p. 455.]

Washington county, ss. O. P., being duly sworn, saith that he is acquainted with A. B., the minor named in the petition hereto annexed; that the said A. B. is reputed to be the son of C. D., late of, deceased, and to be of the age in the said petition set forth; and this deponent further saith, that the said A. B. is a resident of, in the said county of Washington; that he is seised in fee simple, as your petitioner believes, of a certain farm situate in, in said county, containing about 100 acres of land, on which there is a dwelling house, two barns and necessary out buildings; that the said farm is worth about one thousand dollars, and the rents thereof are about sixty dollars a year. That the said A. B. is possessed of a personal property of the value of two thousand dollars; that the said personal property is composed of the following items, to wit:

Ten shares in the Bank of A., worth.....	\$250 00
A bond and mortgage executed by B., on which is due and well secured.....	750 00
Ten cows, worth.....	150 00
One hundred sheep,	200 00
Promissory notes and accounts to the amount of.....	500 00
And household furniture of the value of	150 00
	<hr/> \$2000 00

That some of the notes and accounts are of a doubtful character, and remain uncollected in the hands of the administrators of his father's estate. That the residue of the said personal property is also in the hands of the said adminis-

trators, *who are willing to deliver it over to the legal guardian of the said A. B.* That this deponent is acquainted with E. F., the person nominated by the said minor as guardian. He is uncle of the said A. B., a man of fair character, and in good circumstances in life, and a proper and suitable person to be such guardian in the opinion of this deponent.

Sworn in open court, &c.

O. P.

NOTE. If the person who proves the circumstances of the minor saw the petition and consent executed, the other affidavits may be omitted, and the fact of execution be inserted in the above.

No. 112.

ORDER FOR THE APPOINTMENT OF GUARDIAN TO BE ENTERED IN
MINUTE BOOK.

[Ante, p. 455.]

IN THE MATTER OF THE GUARDIAN- SHIP OF THE PERSON AND ESTATE OF A. B., A MINOR.	}	June 10, 1859.
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On reading and filing a petition of A. B., a minor, setting forth that he is the son of, late of, deceased, and is aged fifteen years and six months, and is a resident of, in said county, and is seised and possessed of certain real and personal property therein mentioned, and nominating E. F., of, to be appointed guardian of the person and estate of the said minor; and on reading and filing the consent in writing of the said E. F. to act as such guardian, if appointed; and the affidavit of O. P. annexed to the said petition, setting forth the circumstances of the said minor: it is ordered that the said E. F. be appointed guardian of the person and estate of the said A. B. during his minority, on his entering into a bond to the said minor, with sufficient security, to be approved of by the surrogate, in the penal sum of; conditioned that the said E. F. will faithfully in all things discharge the duty of a guardian to the said minor, according to law, and that he will render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof when thereunto required.

No. 113.

BOND OF GUARDIAN.

[Ante, p. 455.]

Know all men by these presents, that we, of, are held and firmly bound unto, of, a minor, in the sum of, lawful money of the United States, to be paid to the said, his certain executors, administrators or assigns, and to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the day of, 1859.

The condition of this obligation is such, that if the above bounden shall faithfully in all things discharge the duty of a guardian to the above named, minor, according to law, and shall render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required, then this obligation to be void, otherwise in full force and virtue.

Sealed and delivered in
presence of

A. B. [L. s.]
C. D. [L. s.]

To be proved or acknowledged as a deed. (See ACKNOWLEDGMENT TO BOND, Appendix No. 40.)

Affidavit of justification, as in No. 40.

No. 114.

ORDER FOR THE APPOINTMENT ON FILING BOND, &c.

[Ante, p. 455.]

IN THE MATTER OF THE GUARDIAN-
SHIP OF THE PERSON AND ESTATE OF
A. B., A MINOR.

} April 4, 1859.

E. F. having produced the bond required by the former order in this matter duly executed with adequate security, and on filing the said bond and the affidavit of justification thereto annexed, it is ordered that the same be approved, and that the said E. F. be appointed guardian of the person and estate of the said A. B., *during his minority*, and that the appointment be forthwith made out and recorded in the book provided for that purpose.

No. 115.

LETTERS OF GUARDIANSHIP.

[Ante, p. 456.]

The People of the state of New York, by the grace of God, free and
[L. s.] independent :

To of, send greeting.

Whereas an application in due form of law has been made to our surrogate of our county of, to have you the said appointed the guardian of the person and estate of, a minor residing in, of the age of fourteen years; and whereas you, the said, have consented to become such guardian, and have duly executed and delivered a bond, pursuant to law, for the faithful discharge of your duty as such guardian, and we being satisfied of the sufficiency of said bond, and that you, the said, are a good and respectable person, and in every respect competent to have the custody of the person and estate of said minor, do, by these presents, allow, constitute and appoint you, the said, the general guardian of the person and estate of said minor, during his minority, hereby requiring you, the said guardian, to do and perform all the matters and things required by law of such guardian, and to render an account of all moneys and property received by you, and of the application thereof, and of your guardianship in all respects, to any court having cognizance thereof, when thereunto required.

In testimony, &c.

Witness, &c.

Annexed to the letter is the following extract from an act of the legislature of New York, concerning executors, administrators, guardians, wards, &c., passed May 16, 1837, page 534:

“§ 57. Every general guardian appointed by the surrogate shall, annually after such appointment, so long as any part of the estate or the income or proceeds thereof remain in his hands or under his control, file in the office of the surrogate appointing him, an inventory and account, under oath, of his guardianship and of the amount of property received by him and remaining in his hands, or invested by him, and the manner and nature of such investment and his receipts and expenditures in form of debtor and creditor.”

No. 116.

PETITION ON BEHALF OF AN INFANT UNDER FOURTEEN YEARS OF AGE
FOR APPOINTMENT OF GUARDIAN.

To the surrogate of the county of Oneida.

The petition of X. Y. respectfully sheweth :

That A. B., late of the town of Vernon, in said county, deceased, departed this life on or about the day of last, without having ap-

pointed by deed or will any guardian for his children, to the knowledge or belief of your petitioner: That he left four children under the age of fourteen years, to wit:, of the age of;, of the age of;, of the age of; and, of the age of: all of whom are residents of the town of V., in said county: That the said infants are seised in fee simple as tenants in common of a certain farm situate in V., in said county, of the value of one thousand dollars, the annual rents and profits of which are about sixty dollars; and are also entitled to a very considerable personal estate, amounting to about the sum of one thousand dollars each.

Your petitioner further sheweth, that the relatives of the said infants residing in the said county of Oneida, are Sarah, the mother of the said infants, with whom they now reside at V., in said county, A. B. and C. D., paternal uncles, residing in Utica, in said county, G. H. and J. K., maternal uncles, residing in Rome, in said county; that L. M. and N. O. are cousins of the said infants and reside at the same place; that they have no grandfather now living or other relatives residing in said county, to the knowledge of your petitioner. Your petitioner prays that may be appointed guardian of the person and estate of the said infants until they arrive at the age of fourteen years, respectively, and until another guardian shall be appointed; and for that purpose, that a day may be assigned for the hearing of the said matter, and that an order be entered directing notice to be given of such hearing to the relatives of the said infants residing in the said county.

Your petitioner further states that is a suitable person to be appointed such guardian, and has consented to act as such, if appointed, and to give the requisite security. Your petitioner therefore prays that the surrogate will take the above matter into consideration and grant the prayer of the petition.

Dated.

X. Y.

Oneida county, ss: The above petitioner being duly sworn, saith that the matters of fact set forth in the foregoing petition are true, according to the best of his knowledge and belief.

Sworn, &c.

X. Y.

Consent of guardian same as for minor above, No. 110.

No. 117.

ORDER ASSIGNING A DAY, &c.

IN THE MATTER OF A. B., C. D., E. F. AND G. H., INFANTS UNDER THE AGE OF FOURTEEN YEARS, AND CHIL- DREN OF, DECEASED.	}	June 10, 1859.
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On filing the petition of X. Y. in behalf of the above named infants, under the age of fourteen years, and residents of the said county, praying for the appointment of a guardian for them, respectively, it is ordered that Monday, the day of, instant, be assigned for the hearing the said matter, at the surrogate's office, in, in said county, at ten o'clock A. M. of the said day, and that at least six days notice, in writing, be given by the petitioner to Sarah, the mother, and A. B., &c., [naming the relatives as in the petition,] of the time and place of the said hearing.

No. 118.

Oneida Surrogate's Court.

IN THE MATTER OF A. B., C. D., E. F. AND G. H., INFANTS UNDER THE AGE OF FOURTEEN YEARS, AND CHIL- DREN OF, DE- CEASED.	}
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Take notice, that a petition has been presented to the surrogate of the county of Oneida for the appointment of, as guardian of the person and estate of the above named infants until they respectively arrive at the of fourteen years, and until another guardian is appointed for them, and that the said surrogate has assigned the day of, at 10 o'clock A. M., at his office in, for hearing the said matter.

Dated.

X. Y.

To [the relatives, &c., naming them.]

No. 119.

AFFIDAVIT OF SERVICE.

[Usual Form.]

ORDER FOR LEAVE, &c.

IN THE MATTER OF A. B., &c.,
[AS BEFORE.]

On reading and filing the affidavit of X. Y., setting forth that he did, on the day of, personally serve a notice, in writing, subscribed by him on, all the relatives of the above named infants who reside in the county of Oneida, on whom this court directed notice of the present application to be served, it is ordered that leave be given, to all persons interested, to exhibit their proofs and allegations.

Affidavit of infants' circumstances, same as No. 111, as far as the facts are applicable.

No. 120.

ORDER FOR APPOINTMENT OF GUARDIAN.

IN THE MATTER OF THE GUARDINSHIP
OF THE PERSON AND ESTATE OF A.
B., C. D., E. F. AND G. H., INFANTS
UNDER THE AGE OF FOURTEEN YEARS,
AND CHILDREN OF, DECEASED.

June 10, 1859.

On filing the proofs taken on the application in this matter, by which it appears that the above named infants are under the age of fourteen years, and are of the ages following, to wit: The said A. B. of the age of thirteen years and four days, &c., &c.; that they are the children of, deceased, and are residents in, in the county of; that they are seised as tenants in common of certain real estate of the annual value of one hundred dollars, and are possessed of personal estate of the value of; and it appearing that is a suitable person to be appointed guardian, and has consented to act as such, if appointed, it is therefore ordered that the said be appointed guardian of the persons and estate of the said infants, respectively, until they arrive at the age of fourteen years, and until other guardians be appointed, on his entering into a bond to the said infants, respectively, as follows, to wit: To the said A. B., in the penal sum of \$5000; to the said C. D. in the penal sum of \$5500, &c., &c., with sufficient security in each of said bonds, to be approved of by the surrogate, conditioned that the said will faithfully, in all things, discharge the duties of a guardian to the said infants, respectively, according to law, and render a true and just account of all

moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required.

No. 121.

BOND, ACKNOWLEDGMENT AND AFFIDAVIT OF JUSTIFICATION.

The same as in No. 113.

No. 122.

ORDER FOR APPOINTMENT ON FILING BOND.

IN THE MATTER OF THE GUARDIAN- SHIP OF THE PERSON AND ESTATE OF A. B., &C. &C. [AS BEFORE.]	}	Date.
---	---	-------

Same as on the appointment of guardian for a minor, except the concluding part, in which, instead of *during their minority*, say, “until they respectively arrive at the age of fourteen years, and until another guardian is appointed for them respectively.”

NOTE. The letters of guardianship are the same as No. 115, except the infant is described as under the age of fourteen, to wit: of [state the exact age;] and instead of appointing him guardian during the minority, it will be, *until he shall arrive at the age of fourteen years, and until another guardian shall be appointed.*

No. 123.

PETITION TO REMOVE A GUARDIAN.

[Ante, p. 460.]

To the surrogate of the county of

The petition of, of the town of, respectfully sheweth:

That on or about the day of, in the year of our Lord, one A. B. was duly appointed by the surrogate of the said county guardian of the person and estate of C. D., a minor under the age of twenty-one years, to wit, of the age of, or thereabouts; that the said A. B., immediately after his said appointment, possessed himself of the personal effects of the said minor, and assumed the control of the rents and profits of the real estate of the said minor, as your petitioner is informed and believes; and your petitioner further sheweth, that since his said appointment the said A. B. has become incompetent, in the opinion of your petitioner, and an unsuitable person to perform the duties of such guardian, by reason of the habitual intem-

perance of the said A. B., in the use of ardent spirits or other intoxicating drink, [or, that the said A. B. has wasted and continues to waste and misapply the estate of the said minor, (or other complaint, as the case may be;)] that your petitioner is an uncle of the said minor, and as such feels an interest in his welfare, [or, that your petitioner is one of the sureties for the said A. B. as such guardian as aforesaid, and is apprehensive that he shall sustain damages by reason of the misconduct of the said A. B. in his guardianship.] Your petitioner therefore prays that the said surrogate will examine the premises, and that a citation may be issued to the said A. B. requiring him to appear before the said surrogate at a day and place therein to be mentioned, to show cause why he should not be removed from his guardianship; and your petitioner prays for such other relief in the premises as the nature of the case shall require.

And your petitioner will ever pray, &c.

(Signed,)

L. M.

Jurat, as in No. 6.

No. 124.

ORDER FOR CITATION.

IN THE MATTER OF THE GUARDIAN- SHIP OF THE PERSON AND ESTATE OF, A MINOR.	}	Date.
---	---	-------

On reading and filing the petition of L. M., a relation of C. D., a minor, setting forth, among other things, that A. B., heretofore appointed guardian of the person and estate of the said minor, has become intemperate, [or as the case is,] and praying that the said A. B. may be removed from his said guardianship; and the surrogate, on examination, being satisfied of the probable truth of the said complaint, it is therefore ordered that a citation forthwith issue to the said A. B., requiring him to appear before the surrogate at his office in, on the day of next, at, to show cause why he should not be removed from his said guardianship.

No. 125.

CITATION.

[Ante, p. 460.]

The People of the state of New York, to A. B., a guardian of the person [L. S.] and estate of C. D., of, a minor, greeting.

Whereas complaint has in due form of law been made to our surrogate of our county of Washington, that you the said A. B. have become incompetent

to discharge the duties of the said office by reason of intemperance, [or, set out the charge as it is in the petition in substance,] and whereas our surrogate of the county of is satisfied by proof of the probable truth of the said complaint; therefore you the said A. B. are hereby cited and required to appear before our said surrogate at on, to show cause, if any you have, why you should not be removed from your said guardianship of the said minor.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereto affixed.

Witness, &c.

No. 126.

ORDER FOR REVOCATION.

IN THE MATTER OF THE GUARDIAN- SHIP OF THE PERSON AND ESTATE OF, A MINOR.	}	Date.
---	---	-------

On filing the citation heretofore issued in this matter, and returnable here this day, and an affidavit of the due service thereof on A. B., guardian of the person and estate of the above minor,† and the said A. B. omitting to appear, it is ordered that leave be given to the said complainant to proceed *ex parte*; whereupon the said surrogate, having examined the proofs and allegations, and being satisfied of the alleged incompetency of the said A. B., it is ordered, adjudged and decreed, and this court, by virtue of the power vested in it, doth order, adjudge and decree, that the said A. B. be removed from the office of guardian of the said minor, and that the appointment heretofore made be revoked.

If the guardian appears and contests the removal, the order will be as in No. 127.

No. 127.

ORDER FOR A REVOCATION ON A HEARING.

L. M. vs. A. B., GUARDIAN OF THE PERSON AND ESTATE OF, A MINOR, &c.	}	Date.
---	---	-------

The same as last to the †, and then as follows: And hereupon the parties respectively appeared, and the surrogate having heard the allegations and proofs of the respective parties, and duly considered the same, and being satisfied of the alleged incompetency, &c., [same as above in No. 126.]

No. 128.

REVOCATION.

The People of the state of New York, to A. B., guardian of the person [l. s.] and estate of C. D., a minor, greeting.

Whereas complaint was lately made to our surrogate of our county of . . . , touching certain misconduct alleged against you as guardian of the person and estate of . . . , a minor, whereupon a citation was in due form issued by our surrogate, under his seal of office, to you, the said guardian, requiring you to appear before the said surrogate at a day now past, and show cause why you should not be removed from the guardianship of the said minor: And whereas the said citation was duly served on you, and such proceedings have been had thereon, that at a surrogate's court held before our said surrogate at . . . , on . . . , it was ordered, adjudged and decreed that for certain misconduct proved to the satisfaction of the said surrogate, you, the said A. B., should be removed from the guardianship of the person and estate of the said minor, as by the said in part recited decretal order, still remaining before our said surrogate of record, more fully and at large appears: Now therefore, be it known, that in pursuance of the said order or decree, and of the statute in such case made and provided, we have removed, and by these presents do remove you, the said A. B., from the said guardianship; and we do, by these presents, revoke the appointment heretofore granted to you as guardian of the person and estate of the said minor.

In testimony, whereof, &c.

Witness, &c.

N. B. The appointment and revocation should be recorded in the book of guardians. All the other orders should be entered in the minute book.

The forms for citing guardians to account are so near like those against executors and administrators, that it has been deemed inexpedient to publish them separate. The reader is referred to the forms of compelling accounts from executors and administrators.

No. 129.

PROCEEDINGS FOR THE ADMEASUREMENT OF DOWER.

[Ante, p. 466.]

PETITION FOR THE ADMEASUREMENT OF DOWER.

To the surrogate of the county of

The petition of Rachel Jackson, of the town of, in said county, widow, respectfully sheweth:

That your petitioner was, on the day of, lawfully married to James Jackson, late of, but now deceased, and lived and cohabited with him until his death, which occurred on the day

of That the said James Jackson was, during such marriage and cohabitation, seised of an estate of inheritance in the following described premises, situate in, in said county, to wit: [Here describe the land:] That A. B., C. D. and E. F. claim to be the owners of the said land, in fee simple, as heirs of the said James Jackson, [or by purchase from him, in his lifetime:] That although more than forty days have elapsed since the death of the said James Jackson, the late husband of your petitioner, yet her dower has not been assigned to her in the said lands, or in any part thereof, by the said claimants, or by any other person, although the same has been requested by her.

Your petitioner therefore prays for an order of this court that admeasurement be made of her dower, in the lands and premises aforesaid, and that three reputable and disinterested freeholders be appointed commissioners for the purpose of making such admeasurement, pursuant to the statute in such case made and provided. [If any of the owners are infants, and have no guardian, that fact should be stated, and the petition should ask for the appointment of some discreet and substantial freeholder as guardian for such minor, for the sole purpose of appearing for and taking care of the interests of such infant, in the proceedings.]

And your petitioner will ever pray, &c.

(Signed.)

Dated.

Jurat as in No. 6.

No. 130.

FORM OF NOTICE TO BE ANNEXED TO THE PETITION.

To the heirs of James Jackson, late of, in the county of, deceased, and such other persons as claim a freehold estate in the lands described in the foregoing [or annexed] petition:

Please to take notice that a petition, of which the foregoing [or annexed] is a copy, will be presented to the surrogate of the county of, at his office in, in said county, on the day of next, at ten o'clock A. M., and a motion will thereupon be made for the order and relief therein specified.

Dated, &c.

(Signed.)

No. 131.

ORDER FOR APPOINTMENT OF GUARDIAN AD LITEM.

Saratoga Surrogate's Court.

IN THE MATTER OF THE APPLICATION OF RACHEL JACKSON, WIDOW OF JAMES JACKSON, LATE OF, DE- CEASED, FOR ADMEASUREMENT OF HER DOWER.	}	Date.
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The above named Rachel Jackson having presented her petition, praying for an order that admeasurement be made to her of her dower in certain lands, therein described, of which it is alleged her late husband was seised of an estate of inheritance during the coverture, and that three reputable and disinterested freeholders be appointed for the purpose of such admeasurement; and it appearing by the said petition that A. B., one of the above named heirs of the said James Jackson, deceased, is an infant under the age of twenty-one years, and has no guardian: whereupon, on motion of the said Rachel Jackson, by C. S. Lester, Esq. her counsel, it is ordered that John Doe, of, a discreet and substantial freeholder, be and he hereby is appointed guardian for such infant, for the sole purpose of appearing for and taking care of his interest in these proceedings.

NOTE.—A copy of this order, duly certified, should be delivered to the guardian as his authority. No other appointment is requisite; though sometimes such appointment is made out.

No. 132.

ORDER FOR ADMEASUREMENT AND THE APPOINTMENT OF COMMISSIONERS.

*Title. (As in No. 131.)**Date.*

On reading and filing the petition of the above named Rachel Jackson, bearing date the day of, praying for admeasurement of her dower in the lands therein mentioned, and for the appointment of commissioners for the purpose of making such admeasurement; and on reading and filing an affidavit showing the due service of the said petition, and the notice thereto subjoined, on the persons therein mentioned as heirs, or owners, [as the case may be,] and the said parties having appeared in pursuance of said notice: whereupon, after hearing the proofs and allegations of the parties, and the surrogate being satisfied that the facts set forth in the said petition are true, it is ordered that admeasurement of the dower of the said widow be made according to the prayer of the said petition, and that L. M. of, and N. O. of, and P. Q. of, three disinterested freeholders, be and

they are hereby appointed commissioners for the purpose of making such admeasurement, according to the statute in such case made and provided; which said lands, in which said dower is to be admeasured, are situate in, in said county, and are bounded and described as follows, to wit: [Here set out a full description of the premises.] And it is further ordered that the said commissioners report to this court, on, at, the said admeasurement and proceedings.

NOTE.—A copy of this order, duly authenticated, is all the authority required. No other appointment is necessary. The statute speaks only of an appointment *by order*. (2 R. S. 489, §§ 9, 10.)

No. 133.

OATH OF COMMISSIONER.

Title. (As in No. 131.)

I, L. M., N. O., P. Q., appointed commissioner, to make admeasurement of dower in the above matter, do swear that I will faithfully, honestly and impartially discharge the duty and execute the trust reposed in me by the said appointment.

Dated.

(Signed.)

No. 134.

REPORT OF COMMISSIONERS.

Title. (As in No. 131.)

To the surrogate of the county of

The undersigned commissioners, appointed to make admeasurement of dower in this matter, respectfully report, that having first taken the oath required by law, they did, on the day of, meet at, on the premises hereinafter described, to discharge the duty and execute the trust reposed in them; that all the parties to this proceeding appeared at the time and place aforesaid; that the said commissioners caused a survey of the said land to be made in the presence of the parties, that is to say: [here describe the whole premises according to the survey,] a map of which is hereto annexed. And they do further report, that at the same time, and in presence of the same parties, they admeasured and laid off to the said widow for her dower the one-third part of the said premises embraced in said order, designating the same by permanent monuments; and which said part, so admeasured and laid off to said widow for her dower, is described as follows: [here set out the description,] as will also appear by the map hereto annexed.

They further report, that the following are the items of the charges attending the said admeasurement: [Here state each item.]

All which is respectfully submitted.

Dated.

(Signed.)

No. 135.

ORDER TO CONFIRM REPORT.

Title. (As in No. 131.)

Date.

On reading and filing the report of, the commissioners appointed to admeasure the dower of the widow in this matter, and the map accompanying the same, whereby it appears that they have admeasured and laid off the dower of the said widow, according to the order heretofore made; and after hearing the respective parties by their counsel, and no sufficient reason appearing to the contrary, it is ordered, on motion of the said widow, that the said report and admeasurement be in all things confirmed, and that the same be filed and entered at large in the book provided for that purpose.

NOTE.—These proceedings can be easily varied, so as to conform to a different state of things.

AN ACT

RESPECTING THE FEES OF SURROGATES.

PASSED MAY 7, 1844.

[3 R. S. 919, § 22, 5th ed. L. of 1844, p. 445. Antc, p. 339.]

The People of the state of New York, represented in senate and assembly, do enact as follows:

§ 1. Section thirty-two of title three of chapter ten of part third of the Revised Statutes, is hereby repealed.

§ 2. For the following services, hereafter done or performed by surrogates, the following fees shall be allowed, nor shall they be entitled to receive any other fees therefor :

Drawing proof of a will when contested, or any other proceeding before him, for which no specific compensation is provided, fifteen cents for every folio.

Drawing every petition in any proceeding before him, not otherwise provided for, including the affidavit of the truth of the facts stated therein, fifty cents.

Every certificate of the proof of a will, when contested, endorsed thereon, including the seal, fifty cents; and for any certificate upon exemplifications of records or papers filed in his office, or upon the papers transmitted upon appeal, including the seal, fifty cents.

Drawing, copying and approving of every bond required by law, fifty cents.

Drawing, copying and recording every necessary paper, and drawing and entering every necessary order, and for rendering every other service necessary to complete proceedings on the appointment of a general guardian of a minor, three dollars; and for the like services in appointing the same person guardian for any other minor of the same family at the same time, one dollar and fifty cents.

Drawing, entering and filing a renunciation, in cases where the same may be made by law, twenty-five cents.

A citation or summons, in cases not otherwise provided for, to all parties in the same proceeding, residing in any one county, including the seal, fifty cents; and for a citation to all parties in any other county, twenty-five cents.

A subpoena for all witnesses in the same proceeding, residing in one county, including the seal, twenty-five cents.

For every copy of a citation and subpoena, furnished by a surrogate, twelve and one-half cents, and every such copy of citation shall be signed by the surrogate.

A warrant of commitment or attachment, including the seal, fifty cents.

A discharge of any person committed, including the seal, fifty cents.

For drawing and taking every necessary affidavit, upon the return of an inventory, fifty cents.

For serving notice of any revocation, or other order or proceeding required by law to be served, twenty-five cents.

For swearing each witness in cases where a gross sum is not allowed, twelve and one-half cents.

For searching the records of his office for any one year, twelve and one-half cents; and for every additional year, six cents; but no more than twenty-five cents shall be charged or received for any one search.

Recording every will with the proof thereof, letters testamentary, letters of administration, report of commissioners for the admeasurement of dower, and every other proceeding required by law to be recorded, including the certificate, if any, at the foot of the record, when the recording is not specifically provided for in this act, ten cents for every folio.

For the translation of any will from any other than the English language, ten cents for every folio.

Copies and exemplifications of any record, proceeding or order had or made before him, or of any papers filed in his office, transmitted on an appeal or furnished to any party on his request, six cents for every folio, to be paid by the person requesting them.

For making, drawing, entering and recording every order for the sale of real estate, and every final order or decree on the final settlement of accounts, one dollar and fifty cents; and for the confirmation of the sale of real estate, seventy-five cents; and for making, drawing, entering and recording any other order or decree, when the same is not otherwise provided for, twenty-five cents.

Hearing and determining, when the proof of a will or the right to administration or appointing a guardian is contested, two dollars.

Taking, stating and determining upon an account rendered upon a final settlement, or determining and deciding the distribution of personal estate, if contested, two dollars for each day necessarily spent therein, not exceeding three days.

For hearing and determining any objections to the appointment of an executor or administrator, or any application for his removal, or for the removal

of any guardian; or any application to annul the probate of a will, two dollars.

For hearing and determining upon an application to lease, mortgage or sell real estate, two dollars.

For drawing and recording all necessary papers, and drawing and entering all necessary orders, on applications for letters of administration, when not contested, and for all services necessary to complete the appointment of administrators, and for the appointment of appraisers, five dollars; but in cases where a citation is necessary, seventy-five cents in addition.

For investing, for the benefit of any minor, any legacies, or the distributive shares of the estate of any deceased person, in the stocks of this state or of the United States, one per cent for a sum not exceeding two hundred dollars; and for any excess, one-quarter of one per cent; for investing the same on bond and mortgage of real estate, one-half of one per cent, for a sum not exceeding two hundred dollars, and one quarter of one per cent for any excess.

For receiving the interest on such investments, and paying over the same for the support and education of such minor, one-half of one per cent.

Appointing a guardian to defend any infant who shall be a party to any proceeding, fifty cents; but where there is more than one minor of the same family, and the same guardian is appointed for all, twenty-five cents for each additional minor; and no greater or other fee shall be charged for any service in relation to such appointment.

Hearing and determining upon the report of commissioners for the admeasurement of dower, one dollar.

For distributing any moneys brought into his office on the sale of real estate, two per cent.; but such commission shall not in any case exceed twenty dollars for distributing the whole money raised by such sale, and no executors or other persons, authorized to sell any real estate, by order of any surrogate, shall be allowed any commission for receiving or paying to the surrogate the proceeds of such sale; but shall be allowed their expenses in conducting such sale, including two dollars for every deed prepared and executed by them thereon, and a compensation not exceeding two dollars a day for the time necessarily occupied in such sale.

But no fee shall be taken by any surrogate, in any case when it shall appear to him, by the oath of the party applying for letters testamentary or of administration, that the goods, chattels and credits do not exceed the value of fifty dollars, nor shall he take any fee for copying any paper drawn by him or filed in his office, except as above provided.

For drawing and recording all necessary petitions, depositions, affidavits, citations and other papers, and for drawing and entering all necessary orders and decrees, administering oaths, appointing guardians *ad litem*, and appointing appraisers, and for rendering every other necessary service, in cases of proof of will and issuing letters testamentary, when not contested, and the will does not exceed fifteen folios, surrogates shall receive twelve dollars; and where

the will exceeds fifteen folios, ten cents per folio for recording such excess, and six cents per folio for the copy of such excess to be annexed to the letters testamentary.

For all fees on filing the annual account of any guardian, when the surrogate shall draw and take the affidavit of the guardian, and for examining such accounts, fifty cents; but when the same shall not be drawn nor taken by him, he shall charge no fees.

No charge shall be made for drawing, copying or recording his bill of fees in any case.

§ 3. The fee for filing any paper in the surrogate's office is abolished.

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